TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

PAGE

MISCELLANEOUS AUTHORITIES:

IN THE

Supreme Court of the United States

October Term, 1971

No. 71-827

HUGHES TOOL COMPANY and
RAYMOND M. HOLLIDAY,

Petitioners,

v.

TRANS WORLD AIRLINES, INC.

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR PETITIONERS

Petitioners Hughes Tool Company ("Toolco") and Raymond M. Holliday ("Holliday") submit this brief on writ of certiorari to review the opinion and judgment of the Court of Appeals for the Second Circuit that affirmed a judgment in favor of respondent Trans World Airlines, Inc. ("TWA") of $145,448,141.07 and increased the rate of interest on that judgment from 6% to 7½%. TWA's cross-petition to review the judgment (No. 71-830) on the ground that it is inadequate was also granted by the Court. Separate briefs are being submitted in No. 71-830.

Opinions Below

The opinion of the Court of Appeals is reported at 449 F.2d 51 (App. A-2739).[1] Earlier opinions in this litigation are reported as follows:

(1) The opinion and order of the District Court for the Southern District of New York, dated February 7, 1963, denying petitioners' motion to dismiss the complaint, is reported at 214 F.Supp. 106 (App. A-255).

(2) The opinion and order of the District Court, dated May 3, 1963, ordering the entry of a judgment by default against petitioners and certifying the presence of a controlling question of law, is reported at 32 F.R.D. 604 (App. A-317).

(3) The opinion of the Court of Appeals for the Second Circuit, dated June 2, 1964, affirming the District Court on the question on which interlocutory appeal was allowed, is reported at 332 F.2d 602 (App. A-328).

(4) The orders of this Court granting and then dismissing writs of certiorari as improvidently granted, dated November 16, 1964, and March 8, 1965, are reported at 379 U.S. 912, 380 U.S. 248, and 380 U.S. 249 (App. A-2738, A-2739).

(5) The opinion and order of the District Court, dated November 16, 1965 affirming the Special Master's refusal to adopt respondent's proposed interim finding, is reported at 38 F.R.D. 499 (App. A-396).

---

[1] Citations to the Appendix filed in this Court in Docket Nos. 71-827, 71-830 are in the form "App. A " or "App. AX ." References to portions of the record that were not printed in the Appendix are in the form "Doc. , p. ."

(6) The opinion and order of the District Court, dated December 23, 1969, confirming the Special Master's damage award in the sum of $137,611,435.95, is reported at 308 F.Supp. 679 (App. A-2027).

(7) The opinion, order, and judgment of the District Court, dated April 13 and 14, 1970, including counsel fees of $7,500,000 and costs, is reported at 312 F.Supp. 478 (App. A-2060).

(8) The opinion and order of the District Court, dated June 10, 1970, granting stay of execution and establishing security pending appeal, is reported at 314 F.Supp. 94.

Jurisdiction

The judgment of the Court of Appeals for the Second Circuit was entered on September 1, 1971. A timely petition for rehearing was filed on September 15, 1971, and denied on September 28, 1971. The petition for a writ of certiorari was filed on December 23, 1971, and was granted on February 22, 1972. The jurisdiction of the Court rests upon 28 U.S.C. § 1254(1).

Questions Presented

1. Does a defendant have a right under the Due Process Clause of the Fifth Amendment and as a part of notice pleading under the Civil Rules to require plaintiff to identify with reasonable specificity the conduct that it claims is illegal before defendant is required to participate in lengthy and expensive deposition proceedings in which plaintiff seeks evidence from the defendant to support the charges of illegality?

2. Is a defendant deprived of property without due process of law in violation of the Fifth Amendment if a court enters a default judgment, as a sanction for refusal to make further discovery, under circumstances that do not permit a presumption that the defendant has no defense to the action, and then treats the default as a conclusive admission of liability and that damage proximately resulted therefrom?

3. After a defendant is in default may a federal court, despite the clear prohibition of Civil Rule 54(c), permit a plaintiff to amend its complaint so that it may be awarded damages substantially greater than those prayed for in the complaint at the time of the default?

4. When the Civil Aeronautics Board has approved an acquisition of control over an air carrier by a person engaged in a phase of aeronautics and has further approved all relevant transactions between them, is the exercise of that control to determine how the air carrier acquires aircraft and the necessary financing therefor immunized from the operation of the antitrust laws under Section 414 of the Federal Aviation Act?

5. May a subsidiary recover against its parent for violation of the Sherman Act because the parent determines the manner and method by which the subsidiary acquires capital equipment, when the parent is not a competitor of those who manufacture and supply such equipment?

6. Is a corporation that has in no way restrained or monopolized a particular area of commerce subject to damages under the Sherman Act because it has "independent economic significance" and is a "potential competitor" of those engaged in that area of commerce?

7. May a plaintiff recover antitrust damages without introducing any evidence that relates the injuries claimed to the restraint or monopolization of trade alleged and without showing that the plaintiff had the financial ability to do what it claims defendants prevented it from doing?

Constitutional and Statutory Provisions Involved

The constitutional and statutory provisions involved are set forth in the Annex hereto. They include the following:

1. United States Constitution, Amendment V.

2. United States Code, Title 15, Sections 1 and 2 (Sherman Act §§ 1, 2) and Sections 14, 15 and 18 (Clayton Act §§ 3, 4, and 7).

3. United States Code, Title 49, Sections 1302, 1378, 1379, 1381, 1384, 1482(b) and (c) and 1485(d) (Federal Aviation Act §§ 102, 408, 409, 411, 414, 1002(b) and (c) and 1005(d)).

4. United States Code, Title 28, Section 1292.

5. Federal Rules of Civil Procedure, Rules 15, 16, 37, 54, and 55.

Statement of the Case

The judgment below for $145,448,141.07, with interest at 7½%, was entered as a sanction under Civil Rule 37 against Toolco, formerly the controlling stockholder of TWA, and Holliday, a Toolco executive and for a time a director of TWA. The District Court ordered that a default judgment be entered after Toolco had elected to rest on the merits of its legal positions in order to obtain appellate review of interlocutory orders of the District Court that

(1) had denied Toolco the right to a reasonable specification of TWA's factual contentions prior to being subjected to burdensome deposition discovery estimated to cost Toolco over $5,000,000, and (2) had held that TWA could maintain an antitrust action notwithstanding that the Civil Aeronautics Board (the "CAB") had authorized and approved Toolco's acquisition of control of TWA and all significant transactions between Toolco and TWA.

Following the default order, a hearing was held before a Special Master. It was limited to the amount of damages to be awarded TWA, without regard to whether the conduct that TWA claimed injured it was illegal under the antitrust laws or to whether that conduct was the proximate cause of the injuries for which TWA claimed damage.

The judgment awards $137,611,435.95 as treble damages under the antitrust laws, plus $7,500,000 in attorneys' fees and $336,705.12 as costs.

The Toolco-TWA Control Relationship

The antitrust damages purportedly relate to the acquisition of TWA's initial jet fleet while under Toolco control. Toolco first acquired a stock interest in TWA in 1938 at the suggestion of TWA's then president to Howard R. Hughes ("Hughes"), the sole stockholder of Toolco and one of the country's leading aviators. By 1944 Toolco had acquired approximately 44% of the stock of TWA. It applied to the CAB for approval, if necessary, of this acquisition. The CAB approved after public hearings the acquisition by Toolco of control over TWA. *Transcontinental & Western Air., Inc., Control by Hughes Tool Co.*, 6 C.A.B. 153 (1944) (App. A-3297).

The CAB found in 1944 that it had jurisdiction over Toolco's acquisition of 44% of the stock of TWA because Toolco had ordered aircraft for TWA, some of which might be sold to airlines other than TWA, and thus was engaged in a phase of aeronautics within the meaning of § 408. The CAB retained jurisdiction over the Toolco-TWA relationship by approving the acquisition of control only on the condition that individual transactions between Toolco and TWA be limited to less than $200 and total annual transactions to less than $10,000.

The CAB reexamined the Toolco-TWA control relationship when Toolco, shortly after the Second World War, supplied desperately needed financing to TWA pursuant to a letter agreement that permitted Toolco to acquire over 70% of the stock of TWA. The CAB ordered an investigation to determine whether the increase in control required further approval under § 408. The CAB concluded that its approval was required because, under the agreement, "a control relationship has been established where the controlled company, which formerly responded to orders from one person with assistance from others by proxies, or otherwise, now responds or may respond to one person at its sole instance." *Transcontinental & Western Air., Inc., Further Control by Hughes Tool Co.*, 9 C.A.B. 381, 391 (1948) (App. A-3311, A-3330). The CAB further held that a requirement that TWA obtain the consent of Toolco before purchasing additional equipment "represents an element of new and increased control arising out of the letter agreement" (9 C.A.B. at 391 n. 18, App. A-3330).

At the public hearing to determine whether this increased control was in the public interest, the Examiner conducted a broad inquiry into "the activities of Toolco with respect to TWA for the period during which the prior

approved control existed." *Trans World Airlines, Inc., Further Control by Hughes Tool Co.*, 12 C.A.B. 192, 194 (1950) (App. A-3333, 3343). He held this inquiry proper "to test what this same controller may do with complete, unqualified control with what it did under a 45-percent ownership of the carrier" (12 C.A.B. at 197, App. A-3342). The purpose of such an examination was solely

> to indicate the kind and character of control which for the past years has been, and which may in the future continue to be, exercised by the same controller exercising the additional degree of control arising from the transactions evidenced by the letter agreement of January 8, 1947. [12 C.A.B. at 197, App. A-3343.]

The inquiry centered on TWA's acquisition of equipment and financing under Toolco control. The Examiner stressed "the contributions of Toolco and Mr. Hughes in the way of financial support to the carrier, [and] in the selection and purchase of its equipment" (12 C.A.B. at 216, App. A-3382). He found that the acquisition of "practically every Constellation aircraft in the TWA fleet now and those on order has been accomplished directly or indirectly with the financial and technical assistance of Mr. Hughes and his company" (12 C.A.B. at 217, App. A-3382-3383). Although critical of the extent to which TWA under Hughes control had relied on debt financing, he concluded:

> The continued interest of Toolco in TWA appears essential to the best interests of the carrier and the public. [12 C.A.B. at 224, App. A-3396.]

The Board adopted the findings, conclusions and recommended opinion of the Examiner. It held:

> The record in this proceeding does not permit us to reach any other conclusion than that reached by the

> Examiner, viz, that the further acquisition of control should be approved as being consistent with the public interest and the requirements of the Act. [12 C.A.B. at 193, App. A-3334.]

The 1950 order approving the acquisition of further control continued in force the provisions of the 1944 control order under which the Board retained jurisdiction over all significant transactions between Toolco and TWA. As a result, every material transaction between Toolco and TWA was submitted to the CAB and approved by it under § 408 through modification of the original orders approving acquisition of control. The CAB issued nineteen modification orders, including orders approving the specific transactions that are the subject of this litigation (pp. 75-81, *infra*).

The Pleadings

In 1960, several large banks and insurance companies demanded, as a condition to their supplying senior financing for TWA's initial jet fleet, that Toolco place its TWA stock in a voting trust controlled by them. Toolco yielded to this demand on December 31, 1960. Six months later, under a new management installed by the lenders, TWA filed an antitrust complaint against Toolco, Holliday and Hughes. The primary object of the new management in bringing an antitrust action was to obtain divestiture of Toolco's stock interest in TWA and thus to solve what it viewed as a problem created by Hughes' interest in TWA (App. A-1886).[2] Hughes was never served.

[2] On April 18, 1962, TWA filed an action against Toolco and Hughes in the Delaware Court of Chancery alleging mismanagement and violations of fiduciary duties. This action has not yet been dismissed.

The complaint (App. A-1) charged in conclusory terms violations of §§ 1 and 2 of the Sherman Act and §§ 3 and 7 of the Clayton Act. Toolco was alleged to be a manufacturer and supplier of aircraft to air carriers and the offenses charged all related to the alleged exclusion of Toolco's competitors from the TWA market for aircraft. The alleged use of Toolco's control of TWA to exclude competitors of Toolco from the TWA market was variously denominated an acquisition of stock in violation of § 7 of the Clayton Act, a boycott, a tie-in, monopolization or an attempt to monopolize, and sales and leases on the condition that TWA not acquire aircraft from any competitor of Toolco.

The complaint alleged a number of acts by Toolco, some during the period of Toolco control and some after the voting trust, in furtherance of the offenses charged. At the damage hearing, however, TWA limited its claims to the manner in which, under Toolco control, TWA acquired its initial jet fleet from Boeing and Convair.[3]

The complaint prayed for treble damages of $105 million, divestiture, and other injunctive relief.[4] Since both TWA and Toolco are Delaware corporations, federal jurisdiction was solely dependent on alleged antitrust violations.

The answers of Toolco and Holliday (App. A-41, A-99) denied the alleged violations of law and asserted as affirmative defenses that the District Court had no jurisdiction

---

[3] In the damage hearing, TWA did not seek any damages for conduct of the defendants after the voting trust took control in December, 1960 or because of an alleged conspiracy between the defendants and Atlas Corporation to bring about a merger of Northeast Airlines and TWA or for alleged malicious and wilful interference with TWA's business after December, 1960.

[4] Toolco sold its interest in TWA in a public offering in 1966.

over the subject matter and that the complaint failed to state a claim on which relief could be granted because: (1) the CAB had authorized and approved Toolco's control over TWA and specifically approved every transaction between Toolco and TWA involving the acquisition of flight equipment or financing, thereby exempting the conduct complained of from the antitrust laws; and (2) the CAB had exclusive primary jurisdiction over the subject matter of the action.

Toolco also filed counterclaims against TWA, the lending institutions, and individuals representing the interests of the lending institutions. The counterclaims alleged violations of the Federal Aviation Act, the antitrust laws and common law.[5]

The Discovery Orders of the District Court

Prior to filing the complaint, the new management of TWA discussed the tactical advantages of seeking the deposition of Hughes at the outset of the litigation. Directors of TWA who knew Hughes stated that he would settle the lawsuit rather than submit to a deposition (App. A-1930-1931). When TWA filed its complaint, it obtained an order sealing the complaint and an order to show cause why the deposition of Hughes should not be taken at once (App. A-x).

---

[5] One counterclaim was asserted derivatively on behalf of TWA. It alleged that the additional defendants had conspired to restrain and monopolize the supplying of senior financing to airlines, had seized control of TWA pursuant to that conspiracy, and, by reason of that conspiracy and acts in furtherance thereof, both before and after the wrongful seizure of control, had injured TWA. Among the acts of which Toolco complained was the ordering of an excessive number of aircraft for TWA and the financing of those aircraft on terms designed to perpetuate the voting trust and to prevent its termination in accordance with its terms.

Toolco urged that it was entitled to a reasonable identification of TWA's factual claims before TWA commenced deposition discovery and that the charges of antitrust violations in the complaint were unintelligible because: (1) Toolco had never manufactured airplanes for airlines and was a supplier only to the extent that it had helped its subsidiary acquire aircraft; and (2) such acts as were alleged in the complaint appeared to be immunized from the antitrust laws, under § 414 of the Federal Aviation Act, by the orders of the CAB approving Toolco's control of TWA and all transactions in which TWA acquired equipment or financial assistance from Toolco. The District Court awarded Toolco priority of discovery (App. A-2077).

The deposition of TWA failed to provide any definition of the ultimate facts on which TWA relied to support its antitrust claims.[6] TWA's President, Charles C. Tillinghast, Jr., who made the decision to file the complaint, was uninformed as to the factual basis for the antitrust charges. He revealed that an antitrust action had been brought on the advice of special counsel for TWA after an incomplete investigation of the facts in order to obtain permanent insulation of TWA from Hughes (App. A-1898, A-1911-1912). He gave as a reason for bringing an antitrust action that it "didn't have the social approbriums [*sic*] attached to it that some other types of action did"—"the best people were defendants in antitrust actions"—and that for this reason settlement might be facilitated (App. A-1912).

Mr. Tillinghast indicated that Mr. Rummel, TWA's Vice President-Planning and Research, and Mr. Leslie, TWA's chief financial officer for seventeen years, might be in pos-

[6] See the statement in this regard of Special Master Rankin, quoted pp. 36-37, *infra*.

session of relevant facts. But to Mr. Leslie's knowledge Toolco never attempted to force TWA to boycott any supplier of aircraft or to force TWA to acquire aircraft from one aircraft supplier rather than another (Doc. 223, pp. 12338-12339). And Mr. Rummel testified that far from restraining competition among manufacturers of aircraft, Toolco and TWA created competition among manufacturers where none previously existed (Doc. 234, pp. 64-65).

While the TWA deposition was in progress, TWA continued to attempt to obtain an order for the deposition of Hughes. TWA procured a subpoena from the District Court in California for the deposition of Hughes as a witness, and counsel for Toolco accepted service of this subpoena on behalf of Hughes. On September 15, 1962, Special Master J. Lee Rankin, who had been appointed to preside over discovery, adjourned indefinitely the return day for the deposition of Hughes. He recommended that a pretrial conference be held at which TWA would be required to delineate the facts on which it based its complaint and at which the issues could be defined (App. A-2383-2389).

Special Master Rankin stressed the inequity of requiring the testimony of Hughes while TWA's factual claims remained undefined. He announced that he considered the holding of a pretrial conference to be so important to the progress of the litigation that in the event counsel did not apply to the court for such a conference, as he had suggested, he would "approach Judge Metzner [to whom the case had been assigned for all purposes] and request that he take such proposed action in order that this case be properly expedited" (App. A-2388).

Toolco applied for a pretrial conference. TWA opposed the application. While awaiting a decision on the application, Toolco served interrogatories designed to elicit TWA's factual contentions. The Special Master ruled that the interrogatories were proper and that TWA could be of great assistance to the progress of the litigation by answering them promptly (App. A-2436). TWA appealed this ruling.

While TWA resisted revealing its factual contentions, it continued to press for the deposition of Hughes. TWA claimed that it would prove 75% of its case through Hughes but refused to reveal what that case might be. On October 25, 1962, the Special Master set February 11, 1963, as the date for the deposition of Hughes in California pursuant to the witness subpoena. He fixed this date in order to give Toolco an opportunity to bring on a dispositive motion addressed to the complaint after Toolco had obtained a definition of the issues, either through answers to interrogatories and further discovery of TWA, or a Rule 16 proceeding (App. A-2431-2437).

The District Court deprived Toolco of this opportunity. On January 10, 1963, it denied Toolco's application for a Rule 16 proceeding, ordered that TWA need not answer interrogatories until 60 days after completion of the Hughes deposition, and confirmed the February 11th date for that deposition (App. A-122-126).

The Order for the Entry of A Default Judgment

Shortly after the action was commenced, Toolco had moved to dismiss the complaint or for summary judgment. Since the District Court advised Toolco that it considered the motion premature, the motion was held in abeyance

pending a delineation of TWA's factual contentions. Toolco told the District Court that once TWA defined its factual claims, Toolco would be in a position to admit the facts (in contrast to legal conclusions) and obtain a determination whether they gave rise to liability and, if so, to what extent (App. A-2129-2130).

Deprived by the District Court's rulings of a definition of TWA's factual claims and faced with the prospect of a deposition expected to take at least "a good two or three months" (App. A-1908) and to cost Toolco $5 million (App. A-280), Toolco abandoned its motion for summary judgment and brought on for hearing the motion to dismiss, based upon the control orders of the CAB and the Commission's jurisdiction over the Toolco-TWA relationship. The District Court denied the motion from the bench (App. A-2653-2654). It refused to certify its denial so as to permit an interlocutory appeal under 28 U.S.C. § 1292(b).[7]

In order to secure appellate review, Toolco on February 8, 1963, filed a Notice of Position, stating that subject only to whatever judicial relief it might thereafter obtain, it elected to rest on the merits of its positions so that it might avoid the burden and enormous expenses of further pretrial and trial proceedings prior to the time that an appellate court had the opportunity to rule upon the decisions and orders of the trial court (App. A-268).

In a hearing the same day, Toolco advised the District Court that by reason of the election it had made, Hughes would not appear for deposition on February 11, 1963 (App.

[7] The District Court gave no reason at the time for this refusal, although later the Court suggested that Toolco could have had review by writ of mandamus (App. A-277). Toolco had sought review by writ of mandamus of the discovery orders of the District Court but the Court of Appeals denied it review.

A-281) and that Toolco's position would be the same, and it would not further defend on the merits, even if Hughes should appear (App. A-298-299). Consistent with this position, Toolco declined to produce documents in addition to some 125,000 that it had already furnished to TWA (App. A-305). The District Court then indicated that it would entertain a motion by TWA for a default judgment (App. A-307).

On February 15, 1963, TWA moved for the entry of a default judgment and also to increase the *ad damnum* from $105 million to $135 million. On May 3, 1963, the District Court granted these motions and referred the matter to the Special Master to determine "the amount of damages to be paid * * *" (App. A-321). Having done so, it also granted the certification under 28 U.S.C. § 1292(b) that it had declined to grant at the time it denied the motion to dismiss the complaint (App. A-322).

The Interlocutory Appeal

Toolco petitioned the Court of Appeals for leave to appeal under 28 U.S.C. § 1292(b). The Court of Appeals limited its review to whether the District Court had jurisdiction of the action and whether the CAB orders were a complete defense to the action (App. A-2736). It affirmed the District Court on those issues. This Court granted certiorari but, at this interlocutory stage of the case, dismissed the writ after argument as improvidently granted (380 U.S. 248, 249, App. A-2738).[8]

---

[8] In its order of May 3, 1963, the District Court dismissed with prejudice Toolco's counterclaims, save one as to which it granted TWA summary judgment. The Court of Appeals affirmed the District Court, with the exception of one counterclaim that it held was within the exclusive jurisdiction of the CAB. This Court also granted certiorari as to the dismissal of the counterclaims but dismissed the writ as improvidently granted.

The Damage Award

At the damage hearing before newly-appointed Special Master Herbert Brownell,[9] TWA predicated its entire case on the fact that Toolco had controlled the acquisition and financing of TWA's initial jet fleet. According to TWA, Toolco did not do as good a job of it as, in hindsight, should have been done and presumably would have been done by TWA, absent that control. On a complaint that alleged the outlines of a boycott, tie-in and attempt to monopolize based upon the exclusion of manufacturers and suppliers of aircraft other than Toolco from the TWA market, TWA sought damages because Toolco, not TWA, ordered aircraft from Boeing and Convair for the TWA market.

According to TWA, TWA should have ordered for its initial jet fleet 33 planes from Boeing and 30 planes from Convair—exactly the planes that Toolco ordered for its subsidiary (App. AX-10-11, AX-15). TWA contended that if it, not Toolco, had ordered the planes, it would have ordered the planes from Boeing sooner, received all the planes instead of cutting back on the size of the fleet, and purchased all the planes instead of leasing some of the Boeing jets for a time and purchasing them later (App. AX-13-14, AX-23). Moreover, since Toolco as purchaser of the Convair aircraft assumed responsibility for all matters pertaining to deliveries of the aircraft, Toolco, so TWA's damage case ran, was responsible for any delay in the delivery of the Convair aircraft beyond the original contract dates even though TWA recognized that there would have been some delay beyond the contract dates whoever had ordered the planes (App. AX-23, Doc. 556-14, 16).

[9] Brownell was appointed to succeed Special Master Rankin after the latter was named Corporation Counsel of the City of New York (App. A-424).

Based on these assumptions, TWA constructed a hypothetical delivery schedule for the 33 Boeing planes and the 30 Convairs (App. AX-43-55). This delivery schedule in turn became the basis for the opinion of an expert witness as to how much more money TWA would have made with the hypothetical fleet than with the fleet it in fact operated during the period for which damages were claimed. This testimony in principal part was based upon the assumption that additional jet capacity would be filled in any given year at the same rate as the capacity actually operated (App. AX-121, AX-136-137, AX-147, AX-160), even though during much of the damage period the airline industry was plagued by too much jet capacity, not too little (App. AX-1604, AX-1703).

TWA also claimed damages based upon testimony of a financial expert as to how TWA, if not under the control of Toolco, could have and, had his firm been retained to advise TWA, would have financed the 63-plane fleet (App. AX-353).

Petitioners introduced no evidence at the damage hearing other than certain industry statistics and expert testimony, including testimony showing that TWA was losing money on many of the jets it in fact operated during the damage period, thereby indicating that TWA was operating too much rather than too little jet capacity (App. AX-2503-2516). Toolco relied on the testimony of TWA's witnesses on direct and cross-examination, and documents introduced during the course thereof, to establish the essential facts as to the procurement of TWA's initial jet fleet. These facts, which were never in dispute, included the following:

(a) Toolco did not manufacture airplanes for air carriers and did not compete with manufacturers and suppliers of aircraft for air carriers. See pp. 100-103, *infra*.

(b) In order to obtain the best jet plane for TWA, Toolco and TWA entered into timely negotiations with Convair for the manufacture of a long-range jet to meet the unique requirements of TWA. Promptly after Convair decided not to manufacture a long-range jet, Toolco ordered Boeing aircraft for TWA (App. A-511-513, A-889-890). At the time Toolco ordered jet planes for TWA, TWA lacked the financial resources to make the requisite down payments and progress payments (App. AX-1378).

(c) To the manufacturers, whether TWA or Toolco ordered the aircraft made no difference. As a Boeing vice president testified: "We considered that they were and are the same" (App. A-1101). Toolco's contracts with the manufacturers prohibited the assignment of the right to receive the aircraft to anybody other than TWA without the consent of the manufacturer (App. AX-1461-1462, AX-1496-1497, AX-1517).

(d) In March, 1959, after the announcement of improved fanjets (App. AX-870), Toolco determined that eight of the Boeing jets and ten of the Convair jets were not needed by TWA for its initial jet fleet and so advised TWA (App. A-560-564). Pursuant to this decision, in the summer of 1959 Toolco assigned to Pan American, with the consent of Boeing, Toolco's contractual rights to six long-range Boeing jets then under construction and Boeing released Toolco from its obligations as to these aircraft (App. AX-1498). Boeing then sold these planes to Pan American (App. AX-1498).

(e) Late in 1960 Toolco released its contractual rights to six of the ten Convair planes that had been determined to be surplus to TWA's needs. Convair then leased these planes to Northeast (App. A-949-950, AX-1525). The remaining four Convairs ultimately were delivered to Toolco, after Toolco in 1961 had offered the planes to TWA and TWA had turned

down the offer (App. AX-1538, AX-1539, AX-1540). The four Convairs sat on the ground until 1963 (App. A-861-863).

(f) Toolco's financial resources and credit made possible payment for and the delivery of 19 of the Boeing jets. Pending the arrangement of permanent financing, Toolco leased these planes on a day-to-day basis. The CAB approved the leases under Section 408 of the Federal Aviation Act (App. AX-2202, AX-2226, AX-2237, AX-2245, AX-2260).

(g) Of the 20 Convair planes TWA received, 19 were delivered after permanent financing was arranged in December 1960.

Special Master Brownell held that the order for the entry of default judgment established both liability and proximate cause. For this reason he found it unnecessary to consider whether the conduct that TWA claimed injured it was conduct that violated the antitrust laws, or how, in light of CAB approval of Toolco control, antitrust damages could properly be awarded based on what TWA contended should or would have happened, absent that control. For this reason, he nowhere in his Report explained how a parent, by ordering planes for its subsidiary instead of having the subsidiary order the same planes from the same supplier, violates the antitrust laws. Nor did he explain what decisions made by the parent as to how many planes the subsidiary needs or whether they should be bought or leased have to do with a boycott, tie-in, or attempt to monopolize.

Special Master Brownell held that "in considering and determining damages," he was required to ignore historical facts. To take into account what actually took place "would be in derogation of the allegations [of the Complaint] and not permissible", because of the order for a default judg-

ment (App. A-1966 Brownell Report 255-256). Special Master Brownell found sufficient basis in the allegations of the complaint to award TWA antitrust damages because it did not purchase 33 Boeing jets and 30 Convair jets on the delivery dates hypothesized by TWA, modified, as to the Convairs, to those set forth in a contract amendment. He did so even though he rejected the testimony of TWA's financial expert as to how a TWA independent of Toolco could have raised the vast amounts of financing required for the 63-plane fleet. He assumed, without explanation, that TWA could have financed the fleet and he awarded damages based on this assumption.

Accepting the approach of TWA's expert that in a given year additional jet capacity would be filled at the same rate as existing capacity, the Special Master awarded TWA $27,600,000 for late delivery of jets and delivery of a smaller number of jets than originally ordered. He awarded TWA $5,300,000 because some of the jets were temporarily leased by TWA pending permanent financing. He awarded TWA $570,748.65 for disruption of TWA's business because the Convair jets were delivered late. The remaining $12,400,000 of the damage award represents the effect of retroactive application of changes in accounting practices made by TWA two-and-a-half years after this action was instituted. The total damage award after trebling came to $137,611,435.95.

The District Court confirmed the Report of the Special Master in all respects (App. A-2027). Judgment was entered for $145,448,141.07, including attorneys' fees and costs, with interest from the date of judgment at the rate of 6%.

The Decision of the Court of Appeals

TWA, Toolco, and Holliday filed cross-appeals from the District Court's judgment. TWA claimed that the judgment was inadequate because the Special Master had used the wrong cost of capital, because TWA should have received moratory interest and interest at a higher rate and because TWA should have recovered as costs the amount it paid for expert testimony. Toolco and Holliday maintained that the judgment entered was without foundation in fact or law, and that the order for the entry of the default judgment under the circumstances of this case and the effect given to that order by the District Court deprived them of their property without due process of law. The Court of Appeals affirmed the judgment in all respects but one. It increased the interest rate from 6% to 7½% (App. A-2796-2798). The total amount of the judgment with interest now stands at over $169 million. Interest alone is running at almost $11 million a year.

Summary of Argument

This case has occupied the attention of the federal courts, at every level, on repeated occasions since 1961 when it was commenced. It involves a huge amount of money. The issues it presents are extremely important—but not, in truth, either complicated or difficult. Once the procedural underbrush is cleared away, as we undertake to do in the first three sections of the Argument, the substantive issue, discussed in the final three sections, appears in stark simplicity: is it a violation of the federal antitrust laws for a parent corporation, whose control of an air carrier subsidiary has been approved by the Civil Aeronautics Board, to

make normal business decisions about the acquisition and financing of capital equipment for the subsidiary? TWA claims that hindsight shows that some of Toolco's decisions as its parent were erroneous, that it was damaged by them, and that it is entitled to recover that damage three times over in a federal antitrust suit. Toolco maintains that even if the decisions were unwise (which it denies), this attempt by TWA to insulate itself from Hughes (App. A-1898, A-1911-1912) amounts to at most a mismanagement claim, cognizable only in state court, rather than a violation of the federal antitrust laws.

I. Toolco has supposed from the outset that the only possible issue in the case is the simple one just described. That issue could have been resolved one way or the other, expeditiously and inexpensively, many years ago. But TWA's complaint was so commodious and so conclusory that it was difficult to be sure that no more than this was involved. Both Toolco and Special Master Rankin pressed from the beginning to find out from TWA just what it really was claiming and what the issues in the case were. These efforts were resisted by TWA and rebuffed by the District Court. Although the Judicial Conference of the United States has insisted over and over again, for many years, that it is imperative in the "big" case that the issues be adequately specified before discovery on the merits is permitted, the District Court ordered that TWA must be allowed extremely expensive and time-consuming discovery on the merits before identifying the issues. The District Court also refused to allow interlocutory review in which Toolco could test its legal position. Because the District Court strayed so far from the permissible course of pre-trial proceedings in cases of this kind, and abused the discretion it must ordinarily have on those rulings, Toolco was left

with no viable option save to refuse to proceed further on the merits of the case and to stand on its legal position. It was only at the damage hearing, after Toolco had been held to be in default, that TWA revealed what it should have been required to disclose at the outset, that despite all the antitrust jargon adeptly used in the complaint, TWA's whole case was that its parent should have provided it with more jets, should have ordered them earlier, and should have financed them differently. See pp. 28-42, *infra*.

II. All agree that the controlling case on the effect of a default is *Thomson* v. *Wooster*, 114 U.S. 104 (1885), but there is great divergence on what that case means. The District Court and Court of Appeals read *Thomson* as saying that a default admits all "well-pleaded allegations of the complaint" and thus reasoned that Toolco had admitted that "the acts pleaded in the complaint violated the antitrust laws." In fact *Thomson* held that a default admits "facts properly pleaded." It is settled that a default does not admit conclusions of law nor does it admit that on the facts pleaded the plaintiff is entitled to relief. Even if the general rule on this were otherwise—and it is not—it would be a constitutionally impermissible denial of due process under the *Hovey-Hammond* rule to hold that, as a sanction for a refusal to permit further discovery, a defendant can be foreclosed from litigating purely legal issues when it is clear that defendant took the act that led to the default so that it could stand or fall on those legal issues. See pp. 42-51, *infra*.

III. When Toolco gave notice to the court and to TWA that it would not proceed further on the merits, the complaint sought a judgment against it for $105 million. Subsequently TWA was allowed to amend its complaint to increase its demand to $135 million and ultimately was

awarded $137.6 million, plus attorneys' fees and costs. No amount of rationalization can escape the fact that in permitting recovery in excess of the amount demanded at the time of default, the courts below have ignored the explicit command of Civil Rule 54 (c) : "A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment." See pp. 52-65, *infra*.

IV. TWA says that the "crux" of its case is Toolco's acts "to control and dictate" the acquisition and financing of aircraft by TWA; the Second Circuit regarded the judgment as based on "the illegality of Toolco's arrogation of all authority for buying aircraft * * *." But the CAB had twice approved, under § 408 of the Federal Aviation Act, Toolco's acquisition of control of TWA and, under § 414 of the FAA, all acts necessary to the exercise of that control are made immune from the antitrust laws. The CAB approved Toolco control even though it was fully aware that Toolco would make exactly the kinds of decisions for TWA of which complaint is now made. The CAB imposed conditions on its approval to prevent abuse by Toolco of its control and scrutinized all subsequent transactions between TWA and Toolco, including those involving the jet aircraft here in issue, for that same purpose. The congressional scheme adopted in the Federal Aviation Act leaves the Board free to balance the anticompetitive effects of an acquisition of control against other factors relevant to the public interest and gives antitrust immunity to control relationships that the Board has approved on the conditions that the Board has required. The court below thought that the Board is not "any more qualified to consider such charges than the federal courts, which daily encounter and resolve antitrust problems," but this fails to recognize that Con-

gress has directed the Board to consider a broader spectrum of considerations than merely the antitrust laws and that the Board "has its special standard of the 'public interest' as defined by Congress. * * * If the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide." *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296, 308, 310 (1963). See pp. 65-88, *infra*.

V. Even aside from the fact of CAB approval, the acts of Toolco for which TWA was awarded damages were not antitrust violations and were at most state law claims for mismanagement. Toolco was lawfully the parent of TWA. It was not in competition with manufacturers or suppliers of commercial aircraft. For Toolco to make decisions about the acquisition of jets for TWA and to act as a conduit by which the planes went from the manufacturers to TWA is to do what a parent normally and naturally does for its subsidiary and has never been held heretofore to violate the antitrust laws. It was absolutely essential to TWA's antitrust claims that Toolco be a competitor of manufacturers and suppliers of commercial aircraft, though even if this had been the case that would not in itself have been sufficient to establish liability. But Toolco was not a competitor of manufacturers and suppliers. The complaint did not allege that it was; the court below quite properly refused to find that it was. The court sought to cure this defect by finding a "possibility" that Toolco was a "potential commercial manufacturer or dealership in airplanes * * *." Factually this was unsound. Legally it was irrelevant. The "potential competitor" doctrine has considerable significance in cases under § 7 of the Clayton Act. To import a Clayton Act test into a Sherman Act charge overlooks

the fact that the Clayton Act seeks to arrest restraints of trade "in their incipiency" while the Sherman Act is directed to "full-fledged restraints." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 323 n. 39 (1962). The Second Circuit compounded its error by speculating about mere possibilities when even the Clayton Act cases require a showing of "reasonable probability." *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 175 (1964). The effect of the decision below in this regard is to encourage litigants with what heretofore have been state law claims to seek treble damages in federal antitrust actions, if they can find a mere "possibility" of "potential competition." See pp. 88-117, *infra*.

VI. Section 4 of the Clayton Act allows recovery of treble damages only to a plaintiff who can show that he has been injured "by reason of" an antitrust violation. This requirement of causation is the same in a default case as in any other. Though there is much confusion in the decisions of Special Master Brownell, the District Court, and the Court of Appeals about the burden, if any, on TWA to show that its damages were by reason of any antitrust violation, the end result is that TWA was awarded damages without establishing causation. TWA did not seek damages because of a restraint on competition among suppliers of aircraft to air carriers. It did not allege, nor did it prove at the damage hearing, that an independent TWA would or could have acquired the number of jets that it now says it should have or that it would have ordered them at the time it now says they should have been ordered. For all that this vast record shows, TWA would have suffered the same losses for which it has now recovered damages even though it had been controlled by an independent board of directors and no so-called "antitrust violation" had ever taken place. See pp. 117-145, *infra*.

ARGUMENT

I. The District Court Erred in Ordering Defendants to Submit to Burdensome and Expensive Discovery Before the Charges against Them Had Been Reasonably Specified.

The plainest principles of fairness and due process, as well as orderly procedure, require that a defendant be apprised of the charges against him before he may be compelled to submit himself to discovery, at an immense expenditure of time and funds. This is particularly true in a treble damage action under the antitrust laws, where the conduct charged is a crime and two-thirds of the relief requested is punitive. Those principles were ignored in the pretrial orders of the District Court and in the affirmance of the judgment by the Court of Appeals.

Two points should be stated at the outset in order that it may be clear that there is no dispute among the parties about them: (1) the effective administration of the Federal Rules of Civil Procedure, and particularly of the discovery rules, requires that wide scope be given to the discretion of the district judge; (2) the rules of procedure and orders of the courts made pursuant to them should be obeyed. Defendants fully accept these two points. But the points are properly understood only when it is remembered that wide discretion is not unlimited discretion and that there are occasions in litigation when the only way for a party to test its position in an appellate court is to respectfully refuse to comply with a court order under the rules.

This case has been colored in the popular mind by the image of a man of great wealth so insistent on maintaining his privacy that he flouts the lawful processes of the United

States courts. The image bears no resemblance to the reality of what in fact happened. It was Toolco that made a responsible decision to decline to proceed further in order to test its legal rights. Toolco specifically advised the court that its decision not to proceed would be the same even if Hughes, who had been subpoenaed as a witness, were to appear on the day set for his deposition (App. A-299, A-303-304).

From the outset of this case Toolco believed its conduct could not, as a matter of law, constitute a violation of the antitrust laws. The defendants and Special Master Rankin pressed for procedures that would require TWA to specify in some meaningful way how it contended that the antitrust laws had been violated, so that defendants might test the legal soundness of these contentions. TWA resisted and the District Court rebuffed all such efforts.

From the outset of this case Toolco believed that the antitrust claims asserted were within the primary jurisdiction of the CAB and had been immunized from the operation of the antitrust laws by orders of the CAB approving Toolco's control of and transactions with TWA. The District Court ruled to the contrary but refused to certify its ruling for an appeal under 28 U.S.C. § 1292(b).

The District Court, instead, ordered that TWA need not disclose its factual contentions until Toolco had been subjected to a deposition that would have taken months and cost it more than $5 million. The Court of Appeals, on application for writ of mandamus, refused to interfere.

It was with the case in this posture, with every other opportunity to secure an orderly determination of its legal position foreclosed, that Toolco made the business decision

not to proceed further in what seemed to it useless litigation on the facts but to stand instead on its legal position. A decision of this kind carries risks for a litigant but is not uncommon when it appears to be the only way to obtain appellate review of interlocutory orders. Thus in *United States* v. *Procter & Gamble Co.*, 356 U.S. 677, 680-681 (1958), the United States solicited dismissal of its complaint as a means of obtaining appellate review of an order requiring it to produce a grand jury transcript. See also *United States* v. *Ryan*, 402 U.S. 530, 533 (1971), holding that a person who believes that a District Court has erred in refusing to quash a grand jury subpoena "is free to refuse compliance and * * * in such event he may obtain full review of his claims before undertaking any burden of compliance with the subpoena."

The case of *Allied Air Freight, Inc.* v. *Pan American World Airways*, 393 F.2d 441 (2d Cir.), *cert. denied*, 393 U.S. 846 (1968), is particularly instructive in this connection because it involved issues so similar to those in the present case. That was an antitrust action by an air freight forwarder against an airline. The airline contended that the CAB had primary jurisdiction. The District Court agreed and ordered the action stayed until the forwarder had exhausted its remedies before the CAB. The court refused to certify its order for appeal under 28 U.S.C. § 1292(b) and the Second Circuit refused to review the order on application for mandamus. The forwarder did not go to the CAB. More than two years later its suit was dismissed without prejudice for want of prosecution. That dismissal, even though without prejudice, was appealable as a final order. On review of it the appellate court held that the primary

jurisdiction doctrine was not applicable, that the stay should not have been ordered, and that the forwarder could now go forward in the District Court.

Thus, in the present case, if the District Court had agreed with the legal defenses the defendants put forward, TWA could have had immediate review if its suit had been dismissed or it could have had review, following the *Allied Air Freight* tactic, if the action had been stayed. In fact the District Court rejected defendants' legal contentions. There still could have been review if the court had allowed a § 1292(b) appeal, as it did three months later on the same issues. Because it refused the § 1292(b) certificate, the decision by defendants not to proceed further was the only way to obtain appellate review without enormous effort, loss of time and expense.

There would have been other devices by which defendants could have tested TWA's antitrust theories if the District Court had required TWA to make clear what its contentions were. In holding that the defendants were entitled to a specification of TWA's factual contentions and a delineation of the issues only *after* they had been subjected to an expensive and burdensome deposition for the purpose of permitting TWA to hunt for evidence to support its ill-defined charges, the District Court overlooked the function of a complaint under modern pleading as well as the nature of discovery under the Federal Rules of Civil Procedure.

At one time the pleadings were expected to inform a defendant of the facts underlying the plaintiff's claim and to define the issues between the parties. They were not a suitable device for this task. Accordingly, under the Federal Rules of Civil Procedure, the complaint is now expected only to give defendant "fair notice of what the plaintiff's claim

is and the grounds upon which it rests." *Conley* v. *Gibson*, 355 U.S. 41, 47 (1957). The defendant's right to know with reasonable specificity the factual nature of that claim is to be vindicated through the various discovery devices provided by the Rules together with pretrial conferences under Rule 16. *Hickman* v. *Taylor*, 329 U.S. 495, 501 (1947). On the 1964 appeal in the present case the Second Circuit upheld the sufficiency of the complaint in the present action (332 F.2d at 610-611, App. A-343-344). With that determination we do not disagree. But that does not mean that the complaint necessarily presented a claim that must be tried. Intelligent use of the rules governing discovery and pretrial conferences may disclose that a complaint, though legally sufficient, is vulnerable to a motion for summary judgment—*e.g.*, *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 290 (1968); *Beckman* v. *Walter Kidde & Co.*, 316 F.Supp. 1321, 1325 (E.D.N.Y. 1970), *affirmed*, 451 F.2d 593 (2d Cir. 1971); *Putnam* v. *Air Transport Ass'n of America*, 112 F.Supp. 885, 886-887 (S.D.N.Y. 1953)—or a motion to strike a particular allegation for which plaintiff has no factual support, *e.g.*, *Alamo Theatre Co.* v. *Loew's Inc.*, 22 F.R.D. 42, 45 (N.D. Ill. 1958).

The same principles of simplified pleading that govern a routine personal injury case are applicable also to the most complex antitrust case. *E.g.*, *Control Data Corp.* v. *International Business Machines Corp.*, 421 F.2d 323 (8th Cir. 1970); *New Home Appliance Center, Inc.* v. *Thompson*, 250 F.2d 881 (10th Cir. 1957); 2A Moore, *Federal Practice* ¶ 8.17[3] (2d ed. 1962). But, as the draftsman of the Civil Rules was at pains to explain in the leading case so holding, simplified pleading is workable for these complicated cases in which fuller disclosure of the basis of

the claim is needed only because disclosure can be had by the other devices in the rules, including Rule 16 and the discovery provisions. *Nagler* v. *Admiral Corp.*, 248 F.2d 319, 322-323 (2d Cir. 1957). See also 4 Wright & Miller, *Federal Practice and Procedure: Civil* 170 (1969).

Simplified pleading works in the "big" case only because of the availability of discovery and similar devices. By the same token the discovery rules are suitable for the "big" case only if their use is controlled much more carefully by the court than in routine litigation, where the parties can be left to use the rules when and how they will. This has been a source of concern throughout the history of the Civil Rules, the problems have been repeatedly studied by knowledgeable and authoritative groups, and widely accepted answers have been found.

The most recent guidelines for the conduct of a large antitrust case are found in *Manual for Complex and Multidistrict Litigation* (1970), developed by a distinguished group of experienced judges under the auspices of the Federal Judicial Center. These guidelines recognize the importance of prompt definition of the issues in the case and the necessity that the defendant be informed in the first instance of the basic facts underlying the complaint. Thus they recommend that the court promptly hold a first pretrial conference in order to "ascertain counsels' current views of the issues involved in the case." *Manual* § 1.2. There is then to be a "first wave of discovery" designed to obtain information concerning the transactions upon which the claims for relief are based. *Manual* § 1.5. The possibility of the disposition of the case by early resolution of some legal question is recognized and procedures

suggested for use if this is the case. *Manual* § 1.8. Only after these preliminary steps have been taken is discovery on the merits to be allowed in a "second wave of discovery." *Manual* § 1.5. Provision is made for earlier carefully-controlled discovery on the merits to provide for emergencies and to permit narrowing of the issues, but the judges are warned that "experience has demonstrated that in a complex case orderly discovery requires that this first wave of discovery be accompanied by plans for full discovery in two successive waves as recommended herein." *Manual* § 1.7.

The teachings of the *Manual* are not a new perception, unavailable for the guidance of the District Court in the years 1961-1963, when this case was in a pretrial stage. Before the present action was commenced a predecessor of the present *Manual*, approved by the Judicial Conference of the United States in March, 1960, had said that in protracted cases discovery must be confined to the genuine issues necessary for decision and that the court must take affirmative steps to define the issues before discovery on the merits begins. *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351, 386-390 (1960). A still earlier report, approved by the Judicial Conference in September, 1951, was to the same effect in insisting that adequate specification of the issues in complex cases is so important "as to require that it be done no matter what the objection or difficulty" and that the issues as particularized "should serve as the basis for the bounds of permissible discovery." *Report on Procedure in Anti-Trust and Other Protracted Cases*, 13 F.R.D. 62, 66-68 (1951).

In this case the need for a meaningful identification of TWA's factual contentions and of the issues, if any, that they raised was peculiarly great because defendants saw no facts alleged in the complaint that would constitute a violation of the antitrust laws. On the surface, the complaint would appear to be detailed. It is long. It has many paragraphs. It seems to state numerous facts. But on closer examination by defendants, the allegations appeared meaningless for they all seemed to center on acts and judgments normally and naturally engaged in by a parent in relation to its subsidiary. The complaint uses in abundance the special jargon of antitrust—"boycott," "tying arrangement," "attempt to monopolize"—to describe a normal and legal relationship between a parent and a subsidiary.

The complaint was even more puzzling because it simply ignored the orders of the CAB approving Toolco's control of TWA and all transactions between Toolco and TWA. Indeed the complaint made no reference whatever to the CAB. Yet the complaint alleged that the acquisition of Toolco's stock interest in TWA violated § 7 of the Clayton Act, a conclusory allegation that made no sense in light of the CAB's approval of that acquisition.

Defendants' reaction to the complaint was that this case was a classic one for summary judgment because none of the facts known to defendants gave rise to an antitrust claim, and defendants were ready to stipulate to those facts. Moreover, Toolco knew, and the damage hearing confirmed, that the key facts relied upon by TWA had to be among the facts known to defendants—for both TWA and Toolco, after 21 years, were aware of all of the facts concerning their relationship. There were, in

truth, no facts to be discovered, and it was wholly unlikely that there would be any "genuine issue as to any material fact" between them as to what had happened in the past, however much they might differ about the legal consequences of those events.

For these reasons Toolco sought to ascertain on which of the facts, known to both parties, TWA was relying to support the conclusory allegations of antitrust violations. Toolco repeatedly made it clear that once TWA's factual claims were defined Toolco would be in a position to admit the facts (in contrast to legal conclusions) and obtain a determination whether they gave rise to liability and, if so, to what extent.[10]

Special Master Rankin had the same difficulty with the complaint. He tried to elicit from TWA and its executives the facts upon which they were relying to establish antitrust violations, but he was unsuccessful. In a hearing on September 15, 1962, he said:

> I had thought that before we completed the testimony of Mr. Tillinghast [the Chief Executive Officer of TWA], I would be informed about the ultimate facts that the plaintiff was relying upon to support

---

[10] For example, as early as October 2, 1961, counsel for Toolco advised the District Court: "We believe that this case can be decided, in so far as the complaint is concerned, on admitted facts." (App. A-2129). In a memorandum filed on July 12, 1962, counsel for Toolco stated:

> Once the present management of TWA has been compelled to disclose the factual basis for its claims, Toolco will be in a position to admit such facts and seek a determination as to whether they give rise to liability and, if so, as to the extent thereof. It has been the position of Toolco since the commencement of this action that once TWA's management is compelled to disclose what it claims, a determination on the merits as to such claims will be appropriate. [Doc. 100, pp. 24-25].

> the various allegations of its complaint, which are largely conclusions of law, but do conform to the requirements of the federal rules concerning such complaints.
>
> I did not think that with the chief executive officer of the plaintiff being deposed, we would reach a point at the conclusion where I would not know the ultimate facts upon which the plaintiff was relying to establish those various allegations insofar as they had a bearing upon a violation of the antitrust laws.
>
> But I did find that I was in that position. I think that has an important bearing upon what is equitable in asking testimony of principal witnesses of the defendant in this case [*i.e.*, Howard Hughes], and when that should be required [App. A-2385-2386].

Accordingly, Mr. Rankin recommended that a Rule 16 proceeding be held, at which TWA would be required to delineate the facts on which it based its complaint and at which the issues could be defined. He announced that he considered the holding of a pretrial conference to be so important to the progress of the litigation that if the parties did not apply to the District Court for a Rule 16 proceeding, which he offered to conduct, he would do so himself (App. A-2386-2388).

This would have been an appropriate case for summary judgment if the issues and the facts on which TWA was relying could have been identified. It is true that in several cases this Court has quoted the statement first made in *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 473 (1962), that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken

the plot." But to say that summary procedures are to be used "sparingly" is to recognize that there are some cases of this kind in which they are proper and useful. The Court emphasized this point in the term following *Poller*, when it said: "Summary judgments have a place in the antitrust field, as elsewhere * * *. Some of the law in this area is so well developed that where, as here, the gist of the case turns on documentary evidence, the rule at times can be divined without a trial." *White Motor Co.* v. *United States*, 372 U.S. 253, 259 (1963). More recently, in *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968), the Court affirmed a grant of summary judgment for defendant in a private antitrust case, and said, at 290:

> While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint.

Courts of appeals, fully sensitive to what was said in *Poller*, have affirmed summary judgments for antitrust defendants in a variety of cases.[11] The matter was well put, in terms

[11] *E.g.*, *California Shipping Co., Inc.* v. *Pacific Far East Line, Inc.*, 453 F.2d 381 (9th Cir. 1971), *cert. denied*, 40 U.S.L.Wk. 3503 (April 17, 1972); *Beckman* v. *Walter Kidde & Co., Inc.* 451 F.2d 593 (2d Cir. 1971); *Dahl, Inc.* v. *Roy Cooper Co.*, 448 F.2d 17 (9th Cir. 1971); *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Chapman* v. *Rudd Paint & Varnish Co.*, 409 F.2d 635 (9th Cir. 1969); *McGuire* v. *Columbia Broadcasting System, Inc.*, 399 F.2d 902 (9th Cir. 1968); *Cohen* v. *Newsweek, Inc.*, 374 F.2d 470 (8th Cir.), *cert. denied*, 389 U.S. 878 (1967); *Cowen* v. *New York Stock Exchange*, 371 F.2d 661 (2d Cir. 1967); *Crest Auto Supplies, Inc.* v. *Ero Mfg. Co.*, 360 F.2d 896 (7th Cir. 1966); *Bond Distributing Co.* v. *Carling Brewing Co.*, 325 F.2d 158 (4th Cir. 1963).

that could have been applicable to this case, in *McGuire* v. *Columbia Broadcasting System, Inc.*, 399 F.2d 902, 905 (9th Cir. 1968):

> However, the showing of a "genuine issue for trial" is predicated upon the existence of a legal theory which remains viable under the asserted version of the facts, and which would entitle the party opposing the motion (assuming his version to be true) to a judgment as a matter of law.

As defendants have always viewed this case, it was not one in which it would have been necessary to probe motive or intent. It is their position that there is no viable legal theory on which the dissatisfaction of TWA's new management with decisions that Toolco had made about the acquisition and financing of jet aircraft for TWA could be made into a valid claim under the antitrust laws.

It was this opportunity to test TWA's legal theory and to obtain a prompt disposition of the case that was foreclosed by the pretrial orders of the District Court. The court denied Toolco's motion for a Rule 16 proceeding, despite the specific recommendation of the Special Master, and refused to require answers to defendant Toolco's interrogatories until after the deposition of the witness Hughes, even though both the Special Master and the District Court found these interrogatories to be proper. Thus the court ordered that Hughes first appear for a deposition on the merits that would be both extensive and expensive, and for which he could not properly be prepared. Toolco would have had to bear all of its own expense at that deposition and, as 78% owner of TWA, would have borne 78% of TWA's expense. The estimate that the deposition would cost Toolco

in excess of $5 million (App. A-280) was never challenged.[12] Only after the expenditure of that huge amount was Toolco to be permitted to have any meaningful description of the nature of the claims against it or any opportunity to demonstrate to the court that the case could be disposed of as a matter of law.

Ordinarily the order of discovery is and must be for the discretion of the trial court. The grant of this broad discretion assumes that it will be exercised to illuminate, rather than to conceal, the issues. This is particularly important in large and complex cases such as this one, for it is a commonplace in cases of this kind that "plaintiffs hesitate to commit themselves to a statement of the issues in the case until they have had substantial discovery from defendants." *Handbook of Recommended Procedures for the Trial of Protracted Cases*, 25 F.R.D. 351, 388 (1960). That is why every set of recommendations for handling these "big" cases has insisted on the vital importance of identifying the issues before discovery on the merits is begun. In this case, however, the discovery orders of the District Court, taken together, denied to defendants the fundamental right to know the charges against them before being subjected to examination in search of evidence or leads to evidence.

The possibilities for harassment of defendants, either for the purpose of inducing a settlement or for other ulterior motives unrelated to the merits of the litigation, are enormous under the procedure permitted by the District

[12] It is of interest that the District Court, which was not disturbed at the prospect of a deposition that would cost defendants more than $5 million, later felt it proper to observe that prior to this case the highest *recoveries* on record in cases that had gone to judgment had been $4.4 million and $4.2 million (App. A-2061).

Court. Particularly in the large antitrust case, where vague allegations of a conspiracy in restraint of trade may result in enormous expenditures on discovery, equal in themselves to a sizable judgment, the rights of a defendant under the discovery rules require protection. To put a defendant to an expense of $5 million in trial preparation before it is known if there is anything to be tried is so grave an abuse of judicial process as to amount to a denial of due process.

But it is not only defendants who have a stake in the matter. It is also in the interest of the courts themselves that the procedures experience has shown to be best for litigation of this kind be followed. Prompt identification of the issues and the stipulation of undisputed facts will greatly reduce the burden that the "big" case imposes on the federal courts. Some cases can be disposed of altogether when, through these procedures, it is seen that, despite the conclusory allegations of an artful pleader, the case is not within the jurisdiction of the federal courts at all but belongs in a state court or before an administrative agency. Other cases, when the issues are identified and the undisputed facts stipulated, can be disposed of expeditiously by summary judgment.[13] Even in those cases that must ultimately be tried on the merits, adherence to the recommended procedures for protracted cases

[13] The presentation of an intelligent motion for summary judgment requires that a defendant know with some certainty the plaintiff's factual claims. In this case, for example, though the complaint alleged a boycott (¶9(c), App. A-9), it was not revealed until the damage hearing that the supposed boycott consisted of nothing more than Toolco's ordering planes for TWA from Boeing and Convair instead of TWA's ordering the same planes from Boeing and Convair.

will keep discovery within reasonable bounds and confine the trial to those genuine issues on which there is a real dispute.

This case has occupied an immense amount of time in the federal courts for 11 years. It has done so because of the failure of the District Court to follow sound principles on the proper management of discovery and pretrial proceedings in complex litigation.

II. The Courts Below Erred in Holding That the Default Established the Truth of Conclusions of Law.

At the damage hearing and in subsequent court proceedings, the major issue between the parties has been the effect to be given to the default. The parties, both Special Masters, the District Court, and the Court of Appeals all considered that the controlling decision was what the Second Circuit referred to as "the venerable but still definitive case" (449 F.2d at 63, App. A-2758) of *Thomson* v. *Wooster*, 114 U.S. 104 (1885). *Thomson* is the authoritative precedent, but the courts below misread the decision and gave the default a broader effect than it properly or constitutionally can have.

In an opinion at the outset of the damage hearing, Special Master Rankin recognized that the default "dispenses with any proof of the facts alleged in the complaint, except as to unliquidated damages" (App. A-365). He stated, however, that even a default judgment "must be just" (App. A-371) and that it was "his duty on behalf of the court to be satisfied of the liability of the defendants * * *" (App. A-372). The District Court, in reviewing the opinion by the Special Master, questioned the state-

ment that the Master had to be satisfied about liability, saying that "liability is not an issue for the Special Master except in a very limited sense" and citing *Thomson* for the proposition that by virtue of the default defendants had admitted the truth of "the well-pleaded allegations of the complaint" (38 F.R.D. at 501, App. A-2030). All subsequent actions in the case were colored by this misreading of *Thomson*. The second Special Master in making his report, the District Court in passing on exceptions to the report, and the Court of Appeals in affirming the judgment all erred by giving too broad an effect to the default. The Second Circuit took the position that "the default had the effect of admitting or establishing that the acts pleaded in the complaint violated the antitrust laws and that those acts caused injury to TWA in the respects there alleged" (449 F.2d at 70, App. A-2772). In accord with this view of the effect of a default, the Second Circuit ruled that "there was no burden on TWA to show that any of Toolco's acts pleaded in the complaint violated the antitrust laws nor to show that those acts caused the well-pleaded injuries" (449 F.2d at 70, App. A-2773). The illegality of Toolco's acts, it said, was "conclusively established by the default judgment" (449 F.2d at 71, App. A-2776).

Neither *Thomson*, nor any other authoritative case, supports such a doctrine. What *Thomson* held is that a default admits "facts properly pleaded." 114 U.S. at 110. Similarly, *United States* ex rel. *Harshman* v. *County Court of Knox County*, 122 U.S. 306, 317 (1887), says that a default admits "material and traversable" allegations of "fact." Nothing in *Thomson* or in any other case supports the proposition that a default admits legal conclusions.

To have included conclusions in a complaint would itself have been improper at a time when there was a rigorous rule that pleadings must be limited to the "dry, naked, actual facts." Pomeroy, *Remedies and Remedial Rights* 576 (2d ed. 1883). A default admitted only those things that would then have been admitted by a general demurrer. *McAllister* v. *Kuhn*, 96 U.S. 87, 89 (1877). Thus it was held that a default did not admit "a mere conclusion of law." *Cragin* v. *Lovell*, 109 U.S. 194, 199 (1883).

There is difficulty in distinguishing between allegations of "fact," which are admitted by a default, and "conclusions of law," which are not, but it has always been clear that the illegality of the conduct charged in the complaint is the ultimate conclusion of law. For this reason, a default has never admitted that the conduct charged by the complaint is sufficient as a matter of law to establish a right of recovery. This is open to challenge even by a party in default. This was indicated in *Thomson* itself when the Court insisted that a decree does not follow as of course after a default but is to be made "according to what is proper to be decreed upon the statements of the bill assumed to be true." 114 U.S. at 113. This was spelled out by the Court in more detail a few years later in *Ohio Central R. Co.* v. *Central Trust Co.*, 133 U.S. 83, 91 (1890):

> If the allegations are distinct and positive, they may be taken as true without proof; but if they are indefinite, or the demand of the complainant is in its nature uncertain, the requisite certainty must be afforded by proof. But in either event, although the defendant may not be allowed, on appeal, to question the want of testimony or the insufficiency or amount of the evidence, he is not precluded from

> contesting the sufficiency of the bill, or from insisting that the averments contained in it do not justify the decree.

To the same effect are *Cragin* v. *Lovell*, 109 U.S. 194 (1883); *McAllister* v. *Kuhn*, 96 U.S. 87 (1877); *Tallman* v. *Ladd*, 5 F.2d 582 (4th Cir. 1925); *United States* v. *Fong*, 182 F. Supp. 446, 451 (N.D. Cal.), *aff'd*, 300 F.2d 400 (9th Cir.), *cert. denied*, 370 U.S. 938 (1962); see *Jackson* v. *Heiser*, 111 F.2d 310, 313 (9th Cir. 1940); 3 Freeman, *Law of Judgments* 2664-2665 (5th ed., Tuttle 1925). State decisions are said to be "almost unanimous" in support of a similar view. Anno., 163 A.L.R. 496 (1946). See, *e.g.*, *Central Foundry Co.* v. *Benderson*, 284 Ala. 144, 223 So. 2d 266 (1969); *Lindsey* v. *Drs. Keenan, Andrews & Allred*, 118 Mont. 312, 165 P. 2d 804 (1946); *Johnson* v. *Johnson*, 92 N.J. Super. 457, 224 A. 2d 23 (1966).

Today's more relaxed notions of pleading allow the use of conclusions in a complaint—2A Moore, *Federal Practice* ¶ 8.12 (2d ed. 1962); 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1218 (1969)—but it is still true that conclusory allegations of an attempt to monopolize do not necessarily constitute a valid antitrust claim. *Central Savings & Loan Assn. of Charlton, Iowa* v. *Federal Home Loan Bank Board*, 422 F.2d 504, 509 (8th Cir. 1970); *SCM Corp.* v. *Radio Corp. of America*, 407 F.2d 166, 170 (2d Cir. 1969), *cert. denied*, 395 U.S. 943 (1969); *Hiland Dairy, Inc.* v. *Kroger Co.*, 402 F.2d 968, 973 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969); *O. Hodgkins Sales Corp.* v. *Chrysler Corp.*, 327 F. Supp. 1020, 1021 (D. Mass. 1971); 2A Moore, *Federal Practice* ¶ 12.08, at 2269 (2d ed. 1968); 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1357, at 595-596, § 1363, at 658 (1969).

On the first appeal the Second Circuit found that the complaint in this case was not vulnerable to a motion to dismiss (332 F.2d at 610-611, App. A-343-344). As Special Master Rankin had noted, the allegations of the complaint "are largely conclusions of law, but do conform to the requirements of the federal rules concerning such complaints" (App. A-2385).[14] This does not mean that every allegation in it must now stand as admitted. The default admitted only the "facts properly pleaded," as the *Thomson* case said, and did not admit all of the "well-pleaded allegations," as the courts below thought. It is for the court, not for the pleader, to decide whether the facts alleged constitute a violation of law for which the plaintiff can have recovery. Even after a default, it remains for the court to consider whether "the unchallenged facts shown of record establish a legally binding obligation; it adjudicates the plaintiff's right of recovery and the extent of it, both of which are essential elements of the judgment." *Pope* v. *United States*, 323 U.S. 1, 12 (1944).

This view of the effect of a default has not been and will not be a burden on the courts. Most complaints follow well-tested patterns and a first-year law student can tell at a glance that the facts admitted by the default give rise to liability. These usual and routine cases are a far cry from an antitrust case, in which there may be hard questions of liability even on an admitted state of facts. There is an analogy between the effect of a default and the effect of a plea of guilty in a criminal case. A criminal defendant admits his conduct by a guilty plea but may continue to challenge the illegality of that conduct. *Haynes* v. *United*

[14] His statement is quoted in context *supra*, pp. 36-37.

States, 390 U.S. 85, 87 n. 2 (1968); *Kolaski* v. *United States*, 362 F.2d 847 (5th Cir. 1966). Challenges of this kind are rare and not burdensome.

It is because the court performs a judicial function, even on a default judgment, and must be satisfied that the judgment is just, that the court has discretion, if it sees fit, to require proof of some or all of the facts going to liability, even after default. Civil Rule 55(b)(2); *Jackson* v. *Kotzebue Oil Sales*, 17 F.R.D. 204 (D.Alaska 1955); *United States* v. *Knox*, 79 F.Supp. 714 (E.D.Tenn. 1948); *Douglas* v. *Harris*, 35 N.J. 270, 173 A.2d 1 (1961); see *Norman* v. *Young*, 422 F.2d 470, 474 (10th Cir. 1970); *Massa* v. *Jiffy Products Co., Inc.*, 240 F.2d 702, 706 (9th Cir. 1957). Even if the court does not choose to call for proof of liability, it must take into account, in entering judgment, facts that have become a part of the record. Thus, for example, if one of several defendants charged jointly defaults but there is a trial on the merits at which the other defendants are successful, judgment must be given against the plaintiff even as to the defaulting defendant. *Frow* v. *De La Vega*, 15 Wall. (82 U.S.) 552 (1872); *Champlin* v. *Tilley*, 5 Fed. Cas. 436 (No. 2586) (C.C.D.Conn. 1809); 6 Moore, *Federal Practice* ¶ 55.06 (2d ed. 1953). Because the rule about the effect of a default was formulated by analogy to what is admitted by a general demurrer (or, as it is called today, a motion to dismiss), a default, as the courts below acknowledged (38 F.R.D. at 501, App. A-396-397; 449 F.2d at 63, App. A-2758), does not admit even allegations of fact if it may be judicially noticed that they are not true. *E.g.*, *In re Woodmar Realty Corp.*, 294 F.2d 785 (7th Cir. 1961), *cert. denied*, 369 U.S. 803 (1962); *Interstate Natural Gas Co.* v. *Southern California Gas Co.*,

209 F.2d 380 (9th Cir. 1953); *Greeson* v. *Imperial Irrigation District*, 59 F.2d 529 (9th Cir. 1932); 5 Wright & Miller, *Federal Practice and Procedure: Civil* § 1363, at 659 (1969).

The decisions on the effect of a default have been written in the context of a default by want of appearance or by failure to answer, rather than of a default imposed as a sanction for enforcement of the discovery rules. Discovery, as it now exists, was unknown at the time that the governing principles on the effect of a default were formulated. Indeed, in the very month that this Court decided the *Thomson* case, it also held that a federal court lacked jurisdiction to order a defendant to give a deposition even in a diversity action in which the state law, applicable under the Conformity Act, authorized depositions. *Ex parte Fisk*, 113 U.S. 713 (1885). There is no reason, however, to suppose that the effect of a default under Civil Rule 37 is, or constitutionally can be, any broader than under Civil Rule 55. A state court, applying rules based on the Federal Rules, has specifically held that it is not. *Douglas* v. *Harris*, 35 N.J. 270, 173 A.2d 1 (1961). The Due Process Clause stands squarely in the path of any argument that it is.

It is settled here that the Constitution bars a court from denying a party all right to defend an action as a punishment for failure to obey a court order, *Hovey* v. *Elliott*, 167 U.S. 409 (1897), though if a party has failed to produce evidence material to an issue it may be presumed that the party's position on that issue is lacking in merit. *Hammond Packing Co.* v. *Arkansas*, 212 U.S. 322 (1909). These cases, as the Court said in *Societe Internationale Pour Participations Industrielles et Commerciales, S. A.* v. *Rogers*, 357 U.S. 197, 209 (1958), "establish that there are constitutional limitations upon the power of courts,

even in aid of their own valid processes, to dismiss an action without affording a party the opportunity for a hearing on the merits of his cause."

Because of these constitutional limitations, a presumption of lack of merit can go no farther than the production order. Failure to produce evidence going only to one issue justifies resolving that issue against the defaulting party but does not permit the court to deny him a right to defend on other issues. The case of *Feingold* v. *Walworth Bros., Inc.*, 238 N.Y. 446, 144 N.E. 675 (1924), decided by one of the strongest state court benches ever assembled, is instructive. Defendants had refused to disclose information that would show the value of stock about which they were claimed to have made false representations. It was held that entry of a default judgment against them for this refusal to produce went beyond the constitutional limits marked out by the *Hovey* and *Hammond* cases. The refusal, the court held, would permit an order precluding defendants from claiming that the value of the stock was less than the plaintiff alleged but they were still free to contest whether they had made any false representations. In another case it was held that the refusal of defendant to disclose the alleged source of information on which a libelous article was based was enough to justify a presumption that no such person existed but it would not support a default money judgment against the defendant. *Mitchell* v. *Watson*, 58 Wash. 2d 206, 361 P. 2d 744 (1961). See also *People* v. *George Henriques & Co.*, 267 N.Y. 398, 196 N.E. 304 (1935); 4A Moore, *Federal Practice* ¶ 37.03 [2.-1], at 37-56 (2d ed. 1970); 8 Wright & Miller, *Federal Practice and Procedure: Civil* 763-764 (1970); Note, *Sanctions for Enforcement of*

Discovery—Constitutionality of Rule 37, 37 Wash. L. Rev. 175, 181-182 (1962); Note, *The Constitutional Limits of Discovery*, 35 Ind. L. J. 337, 349-350 (1960).

When defendants filed their Notice of Position they took their chances on whether they were right or wrong about the applicable law. They gave up their right to challenge the factual allegations of the complaint. They cannot be held, however, to have admitted the legal conclusions of the complaint that their acts were illegal and that any damage suffered by TWA was the proximate result of the facts alleged. There can be no presumption of want of merit in their legal position when their refusal to proceed further was because they wished to stand on that legal position. The holding below that because of the default even the most conclusory allegations of the complaint are admitted, and that the illegality and its causal relation to the damages are established, is unsupported by precedent and is a constitutionally impermissible punishment of defendants for the position they took. It was and is the view of the defendants that the conduct relied on by TWA had no relationship to a violation of the antitrust laws and that the admissions of TWA at the damage hearing established that fact. The default did not, and constitutionally could not, establish the contrary.

If a default has the novel effect that the courts below, by their misreading of *Thomson* v. *Wooster*, have given it, Rule 37 was violated by the grant of a default judgment. The District Court purported to rely on what were then Rules 37(b)(2)(iii) and 37(d). But Rule 37(b)(2) provided that "the court may make such orders in regard to the refusal as are just, and among others" might render

a judgment by default.[15] If a default judgment establishes the illegality of the conduct with which a defendant is charged, it would not be "just" to enter a default judgment, the severest of all possible sanctions, when it is well understood that defendant's refusal to make further discovery is to test the illegality of the charged conduct. Although the limitation to "just" sanctions is addressed in the first instance to the trial courts, it is vigorously policed by the appellate courts. The appellate courts do this because they are aware of the constitutional issues that lurk so closely in the background if overly drastic sanctions are imposed and because they recognize the general purpose of the Civil Rules to encourage dispositions on the merits. 4 Moore, *Federal Practice* ¶ 37.08 (2d ed. 1970); 8 Wright & Miller, *Federal Practice and Procedure: Civil* § 2284 (1970).

Thus what happened below would be wrong even if a default admits ultimate legal conclusions. But the courts below erred in thinking that legal conclusions, as distinguished from facts, are admitted by a default. Defendants were entitled to an independent judicial determination of whether their acts as alleged in the complaint, supplemented by TWA's admissions at the damage hearing and by facts that may be judicially noticed, were in violation of the antitrust laws. The courts below erred in denying them this determination and in relying instead on the conclusions of the pleader.

---

[15] As a part of the 1970 amendments of the discovery rules, language limiting the court to such sanctions "as are just" was added to Rule 37(d). The courts, however, had always held that the express limitation stated in Rule 37(b)(2) applied also to Rule 37(d). Rosenberg, *Sanctions to Effectuate Pretrial Discovery*, 58 Col.L.Rev. 480, 494 (1958).

III. The Courts Below Erred in Allowing Recovery in Excess of The *Ad Damnum*.

Civil Rule 54(c) is brief and explicit. It provides:

> A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Thus the rule draws a sharp distinction between default judgments and all other judgments and lays down separate rules for each. A default judgment cannot go beyond the *ad damnum*. Other judgments are not so limited and, as against a party not in default, the claimant is to be given whatever relief he is entitled to, whether he has demanded it or not. The command of the rule is emphasized by Civil Rule 55(d), which states: "In all cases a judgment by default is subject to the limitations of Rule 54(c)."

In the present case paragraph (3) of the prayer for relief in the complaint prayed for "$105,000,000, threefold the damages sustained by plaintiff, together with costs and attorneys' fees" (App. A-31). After defendants had advised the District Court that they were not going to proceed further, that court granted TWA's motion to increase the *ad damnum* from $105 million to $135 million (32 F.R.D. at 607, App. A-321). The judgment actually entered, exclusive of attorneys' fees and costs, was for $137,611,435.95 (App. A-2073), and here, as in the courts below, TWA is claiming that it is entitled to even more. The process by which the courts below found

that they were not bound by the clear limitation of the first sentence of Rule 54(c) deserves examination.

The discussion of this issue by the District Court is, in its entirety, as follows:

> That branch of the motion seeking to increase the *ad damnum* clause from $105,000,000 to $135,000,000 is granted. This is not a case where a party has defaulted in appearance. Here issue was joined and adversary proceedings continued in the pretrial stages of this litigation. The damages originally asserted were unliquidated and TWA is entitled to recover for whatever damage it can show it suffered. Furthermore, Toolco will be represented at the hearings necessary to assess damages under rule 55(b)(2). Rule 54(c); Peitzman v. City of Illmo, 141 F.2d 956 (8th Cir.), cert. denied, 323 U.S. 718, 65 S. Ct. 47, 89 L. Ed. 577 (1944); cf. Riggs, Ferris & Geer v. Lillibridge, 316 F.2d 60 (2d Cir. 1963). [32 F.R.D. at 607-608, App. A-321.]

The reference by the District Court to Rule 54(c) is mystifying, unless the court noticed only the final language of the rule and failed to note the first sentence or the introductory clause of the second sentence. Nor is the court's position strengthened by its reference—with a "cf." signal—to *Riggs, Ferris & Geer* v. *Lillibridge*, 316 F.2d 60 (2d Cir. 1963). That was not a default case. In holding that after a full contested trial the court can award judgment in excess of the amount demanded, the court in *Riggs* was making a routine application of the second sentence of Rule 54(c). Wright, *Federal Courts* 437 (2d ed. 1970). The case says nothing whatever about the first sentence of the rule.

Thus the only authority cited by the District Court that even arguably supports it on this point is *Peitzman* v. *City of Illmo*, 141 F.2d 956 (8th Cir.), *cert. denied*, 323 U.S. 718 (1944). The shaky quality of that decision as precedent is best indicated by quoting the entire relevant portion of the Eighth Circuit's decision. Defendant in that case was claiming error in allowing an amendment, after his default, raising the prayer for punitive damages from $10,000 to $20,000.

> The other amendment concerns the amount of damages prayed for. In this connection it should be observed that the record is in a confused condition; it in fact presents a paradox. The petition as served in the state court asked for $5,000 compensatory damages. The first amended petition, filed August 2, 1941, while the case was still in the state court, shows that the prayer for compensatory damages was in the sum of $5,000 and for punitive damages in the sum of $20,000. On October 7, 1942, the record indicates, plaintiff gave notice of motion to amend the prayer of the petition by interlineation, by increasing the amount of punitive damages from $1,000 to $10,000, which motion was granted October 12, 1942. In fact, instead of increasing the amount of the claim for punitive damages from $1,000 to $10,000, by this amendment the amount of the claim for punitive damages was decreased from $20,000 to $10,000. At the time of the trial plaintiff moved to amend the complaint "in the actual damages up to $5,000.00 and to amend the amount of punitive damages to $20,000.00." In this state of the record it is doubtful whether the prayer for punitive damages was in fact increased in amount. Rule 54(c) provides in part as follows: "A judgment by default shall not be different in

kind from or exceed in amount that prayed for in the demand for judgment." Rule 55(b) makes provision for a hearing on the question of the amount of damages where defendant has appeared in the action. Rule 54(c) apparently is a general rule applicable in case of a non-appearing defendant in complete default. On a hearing on the question of damages, under Rule 55(b) a defendant, though in default, is in court on a hearing limited to the question of the amount of damages, to the same extent that he is in court in a trial on the merits, and we think amendments at the trial are as appropriate in the one case as in the other. Amendments to a pleading may be allowed at the hearing on damages as to the relief prayed, subject to the right of the defendant, if taken by surprise or put to a disadvantage, to ask for a continuance or for time in which to prepare to meet the enlarged claim. See Rule 5(a); La Barre v. City of Waterbury, 69 Conn. 554, 37 A. 1068. In general, it may be said that a change in the amount prayed for is not of vital importance, as the prayer for relief is in fact no part of the claim or cause of action stated. [141 F.2d at 962.]

A number of things may be said about this confused case. First, since, as the court said, "it is doubtful whether the prayer for punitive damages was in fact increased in amount," the necessity for deciding whether an increase after default is permissible is also doubtful. Second, the default was entered because of defendant's failure to appear for depositions in April and May of 1942, at which time the punitive damages sought were clearly $20,000. The confusing developments all occurred subsequent to that failure. Third, the jury awarded $10,000 as punitive dam-

ages. 141 F.2d at 956. There was no need to rely on either the original demand for $20,000 or the later reinstated demand for that amount in order to affirm the award. Fourth, the only authority cited by the Eighth Circuit for its discussion of the right to amend after default had nothing to do with the limiting effect of the *ad damnum*. Plaintiff in *LaBarre* v. *City of Waterbury*, 69 Conn. 554, 37 Atl. 1068 (1897), had given notice of his claim to the defendant municipality before bringing suit, as he was required to do, but had neglected to allege in his complaint that he had given notice. The court allowed plaintiff to amend to state the fact of notice but also offered to allow defendant to plead anew and to present its witnesses if it wished to do so. The *LaBarre* case, to the extent that it is relevant under very different procedural rules, merely supports a discretionary power in the court to reopen a default for the plaintiff's benefit, so that no injustice will be done because of an inadvertent procedural omission.

We return from the dubious and confused authority of *Peitzman* to the proceedings in the present case. The Second Circuit affirmed the holding of the District Court that an increase in the *ad damnum* is permissible. It said:

> Although the authorities do not appear to be in agreement and this Circuit has not expressed itself on the question, we are of the view that there is no sound basis for restricting TWA to the precise damages originally sought in a case where damages alleged were unliquidated, and where defendant did not default by non-appearance, but rather because of non-compliance with discovery procedures, and indeed was granted a full trial on the question of damages actually caused by the allegations established by its default. See *Riggs, Ferris & Geer* v. *Lillibridge*, 316 F.2d 60, 62-63 (2d Cir. 1963);

Sarlie v. *E. L. Bruce Co.*, 265 F. Supp. 371 (S.D. N.Y. 1967); 6 Moore, Federal Practice ¶¶ 54.61, 55.08 at 1206. Toolco cannot in good conscience complain of any unfairness or surprise, for, as we said in discussing the propriety of the default judgment, at no time has it sought to rectify its refusal to cooperate with the legitimate discovery orders, an act it easily could have performed after Judge Metzner granted the motion to increase the ad damnum. Moreover, at the February 8 hearing, prior to Hughes's non-appearance, TWA clearly announced its intention to apply for an increase in the prayer for damages to the trebled $135 million. [449 F.2d at 78-79, A-2792.]

It is of interest that the Second Circuit did not rely on the *Peitzman* case, though this is not surprising in view of the shakiness of that case as authority, the fact that the Ninth Circuit, as will be seen, had refused to accept the dicta in *Peitzman*, and the obvious embarrassment with which TWA made even passing reference to *Peitzman* in its brief in the Second Circuit.

The authorities on which the Second Circuit did rely are of interest. The *Riggs, Ferris* case, as pointed out in the discussion of the District Court's opinion, was not a default case and goes only to the second sentence of Rule 54(c). Professor Moore does indeed twice repeat a sentence consistent with the ruling of the Second Circuit but he cites no authority except the *Peitzman* case. 6 Moore, *Federal Practice* ¶ 54.61, at 1206, ¶ 55.08, at 1823 (2d ed. 1953).[16] The decision in *Sarlie* v. *E. L. Bruce Co.*, 265

[16] Another treatise, more cautiously, states what was said in *Peitzman* but prefaces the statement with a noncommittal "it has been held that * * *." 3 Barron & Holtzoff, *Federal Practice and Procedure* § 1216, at 87 (Wright ed. 1958).

F. Supp. 371, 377-378 (S.D.N.Y. 1967), is a square holding in support of the ruling below. In *Sarlie* the court said that "it is arguable * * * as a matter of policy" that the limitations of Rule 54(c) should not apply to a default judgment where the defendant has appeared and thought it found "support in case law" for this position in *Peitzman* and in the decision of the District Court in the present case. Thus if *Peitzman* is put to one side, as the Second Circuit recognized sound analysis requires and as the Ninth Circuit has held must be done, there is literally no support for the view of Professor Moore, no support for the decision of the District Court in the present case, no support for the decision in the *Sarlie* case, and thus no support for the ruling of the Second Circuit in the present case except for Judge Cannella's suggestion in *Sarlie* about what might arguably be "sound policy."

The principal theme of the decisions below—as well as of the *Peitzman* and *Sarlie* decisions—is that the limitation of Rule 54(c) applies only to a default for total failure of a defendant to appear and that it does not apply to a defendant who has appeared and later defaulted or later been defaulted because of his failure to make discovery. The simple answer to this is that Rule 54(c) makes no distinction of this kind. The draftsmen of the Civil Rules would not have been at a loss for words if they had wished to make that distinction. Indeed they made just such a distinction in several places in the rules. The notice provisions of Rule 55(b)(2) apply only "if the party against whom judgment by default is sought has appeared in the action" while Rule 5(a) requires service of all papers subsequent to the complaint except on

"parties in default for failure to appear." Their failure to use any words of qualification when they spoke of "judgment by default" in Rule 54(c) shows beyond question that they meant to speak to all judgments by default, whether against a party who "has appeared" or against one "in default for failure to appear."

Nor was this inadvertence on the part of the draftsmen. In an article that had great influence on the drafting of the Civil Rules, Judge Clark and Professor Moore had argued that the prayer for relief should limit the judgment only in cases of default for nonappearance. Clark & Moore, *A New Federal Civil Procedure—II. Pleadings and Parties*, 44 Yale L.J. 1291, 1303 (1935). Both of those distinguished men have recognized that their suggestion on this point was not adopted. Judge Clark later noted that "the federal rule might well have gone further and restricted the judgment to the demand only when the defendant had not appeared * * *." Clark, *Code Pleading* 267 n. 168 (2d ed. 1947). Professor Moore notes policy arguments in favor of not limiting the plaintiff by his demand in a case in which the default is by a party who has appeared, and then says: "But Rule 54(c) does not go that far; it makes no distinction in the type of judgment by default; and hence all judgments by default are subject to its limitations." 6 Moore, *Federal Practice* ¶ 54.61, at 1206 (2d ed. 1953).

The suggestion of the Second Circuit that Rule 54(c) is not limiting because "at the February 8 hearing, prior to Hughes's non-appearance, TWA clearly announced its intention to apply for an increase in the prayer * * *" (449 F.2d at 79, App. A-2792), is also unsound. It is

true that Hughes was scheduled to appear for his deposition on February 11th and that TWA gave notice at the hearing on February 8th that it would seek to amend the prayer (App. A-271). But that hearing was held only because earlier on February 8th Toolco had filed with the court its Notice of Position, announcing that it would not proceed further and would rest on the merits of the positions it had taken (App. A-268). It was by the filing of the Notice of Position that Toolco crossed the Rubicon.[17] At that time it had no notice that TWA was making or would make any claim in excess of $105 million.

The result would hardly be different even if the chronology had been otherwise. If amendment of the *ad damnum* clause was precluded by Rule 54(c), mere notice of the precluded amendment could not cure the preclusion.

A better understanding of Rule 54(c) than that applied by the courts below in this case is evidenced in *Fong* v. *United States*, 300 F.2d 400 (9th Cir.), *cert. denied*, 370 U.S. 938 (1962), a case that was not noted by either the District Court or the Court of Appeals, though it was cited to both of them. The United States had sold a number of surplus ships to Fong for scrapping by him and later brought an action asserting various claims against him arising out of that transaction. The government contended that Fong had not scrapped some of the

[17] The Second Circuit's opinion reflects a consistent misunderstanding of this point. It says, at a number of places and in a variety of ways, that "entry of the default was inevitable after Hughes's nonappearance * * *" (449 F.2d at 58, App. A-2748). The fact, as the District Court correctly noted (32 F.R.D. at 607, App. A-320-321), is that it was Toolco that made a responsible decision not to appear and that it specifically advised the court that its decision to proceed would be the same even if Hughes were to appear for his deposition (App. A-299, A-303-304).

ships within the time permitted under the conditions of sale and that he had resold other ships without scrapping them, contrary to the conditions of the sale. In one count the United States sought double damages under the False Claims Act, in another it sought double damages under the Surplus Property Act of 1944, in another it sought damages for conversion of personal property, and in Count Four it sought damages for breach of contract. A default was ordered because of the failure of Fong to appear for his deposition. Both parties participated in the damage hearing.

The District Court in that case thought there was grave doubt whether the first three counts stated a claim but held that the United States was entitled to contract damages under Count Four. *United States* v. *Fong*, 182 F. Supp. 446, 451 (N.D. Cal. 1959). At the time of the default Count Four alleged facts showing that Fong had breached his contract both by his delay in scrapping some ships and by selling others while they were still unscrapped. The prayer for relief on that count, however, asked only for the liquidated damages provided for in the contract for delay in scrapping.

Initially the court ordered judgment for $516,000 in liquidated damages for the delay in scrapping and an additional $511,000 in actual damages for selling unscrapped ships. 182 F. Supp. at 452-454. On a motion for amendment of the judgment Fong argued that the award of actual damages violated Rule 54(c). The court agreed, holding that Rule 54(c) precluded the recovery by default of anything in excess of liquidated damages. 182 F. Supp. at 454-455. It rejected the government's argument that

Rule 54(c) did not apply because the judgment was entered only after a trial on damages in which Fong participated through counsel. 182 F. Supp. at 455.

On a cross-appeal on this point by the United States, the Ninth Circuit affirmed the holding below that the actual damages for selling unscrapped ships could not be recovered. The appellate court was impressed neither by the *Peitzman* case nor by the sentence from Professor Moore's treatise based on *Peitzman*. It said:

> It must be borne in mind that the mandate of the Rule is very simple, clear and decisive that a judgment "shall not be different in kind from or exceed in amount that prayed for in the demand for judgment" in default cases. Peitzman, supra, was not based upon facts like those in this case, in that, the record was in a "confused condition", and was such that "In this state of the record it is doubtful whether the prayer for punitive damages was in fact increased in amount". Very likely the court in that case in accepting the so-called trial amendment ostensibly increasing the amount of demanded damages, thought that all the court did was to put the statement of the damages demand as to amount back in the very same condition of that statement in the pleading before any changes ever were made, as the parties intended, thus correcting an obvious mistake.
>
> In view of the foregoing, we conclude that for the reasons stated Peitzman, supra, is distinguishable from this case, and should not control or influence our decision here. Moreover, we are unable to escape the explicit and emphatic mandate of Rule 54(c) which unmistakably commands that upon the facts and circumstances of this case the judgment

"shall not be different in kind from or exceed in amount that prayed for in the demand for judgment" at the time of the entry of default. [300 F.2d at 413.]

The *Fong* case is decisively against any right of TWA in this case to recover more than $105 million, exclusive of attorneys' fees and costs. When this case was before the Second Circuit, TWA sought to distinguish *Fong* on two different grounds. It first argued that in *Fong* the government never moved at any time to amend the *ad damnum* clause, while it had made such a motion here after Toolco gave its Notice of Position. This will not do. Either Rule 54(c) states a limitation on default judgments or it does not. If it does, that limitation can hardly be so readily avoided by the formality of offering an amendment. If it does not, an amendment is unnecessary. Rule 15(b), on amendments to conform to the evidence, is no less effective than is Rule 15(a), on formal amendments.

As a second purported distinction offered to the Second Circuit, TWA noted that the complaint in *Fong* asked for liquidated damages while after default the United States also sought actual damages. TWA discerned a difference between an attempt, as in *Fong*, to recover damages "qualitatively different" and an attempt, as it was making, to permit "a purely quantitative difference" in the size of the award. Thus, while its earlier arguments, both in the District Court and in the Court of Appeals, had asked those courts to disregard the first sentence of Rule 54(c) entirely, this second distinction would have had the court rewrite the first sentence to read: "A judgment by default shall not be different in kind but may exceed in amount that prayed for in the demand for judgment." One need

only look at what the first sentence says, as promulgated by this Court, to realize why that purported distinction of *Fong* is untenable.

In opposing certiorari here, TWA abandoned its earlier distinctions and offered still a third reason why *Fong* has no bearing on this case. It described *Fong* as rejecting the government's argument "that the demands made in the insufficient claims could be used to support the higher recovery" and said that the Ninth Circuit had held only that "since each claim seeking actual damages had been found not to state a claim, it would be unjust to import into the single sufficient claim the entirely different theories of damage computation embodied in the insufficient claims." Brief in Opposition at 40. There is discussion in the *Fong* opinion that bears some resemblance to this description by TWA, but the argument is likely to be persuasive only to one who has not read *Fong*. In the opinion at headnote 10, 300 F.2d at 412-413, the Ninth Circuit considered, and rejected for reasons we have quoted, the argument that Rule 54(c) was inapplicable and that the judgment on Count Four was not limited by the demand on that count. After it had concluded that discussion it turned to the alternative argument that the allegations or demands in the first three counts might somehow allow greater relief on Count Four. It considered this, under headnotes 11 and 12, 300 F.2d at 413-414, and rejected this argument also. But the fact that the Ninth Circuit in *Fong* also rejected an alternative argument for greater recovery, not available in this case, does not detract from the force of its rejection of the first argument, the argument that TWA necessarily is making here.

The reason for the limitation imposed by Rule 54(c) is readily apparent. Before a defendant chooses a course that may result in a default judgment against him, he is entitled to know what the consequences to him will be. This is essential as a matter of fairness, if not indeed as a matter of due process. This much is due to every defendant, whether he has appeared or not appeared. A defendant who elects to refuse to continue discovery in order to test the merits of his legal position runs the risk that this may be costly if he is wrong about the law, but he is entitled to know what the maximum cost may be.

Rule 54(c) is, as the Ninth Circuit said, "very simple, clear and decisive." If, as a matter of policy, any change in the rule is indicated, it should be by the usual process of rule amendment, rather than by a vaguely-defined judicial gloss that would make the rule on the books a trap for unwary litigants. This Court should give effect to "the explicit and emphatic mandate" of the rule by holding that the judgment below is a nullity to the extent that it awards TWA, exclusive of attorneys' fees and costs, in excess of $105 million. *Pueblo Trading Co.* v. *El Camino Irrigation Dist.*, 169 F.2d 312, 313 (9th Cir. 1948), *cert. denied*, 335 U.S. 911 (1949); Clark, *Code Pleading* 270 (2d ed. 1947).

IV. CAB Orders Approving Acquisition of Control of a Carrier Create Antitrust Immunity for the Exercise of That Control.

The decision of the Court of Appeals must be reversed because the court below awarded treble damages for conduct immunized from Sherman and Clayton Act penalties.

TWA recognized that the "crux" of its complaint is "Toolco's acts and efforts, through the exercise of its stock control over TWA, to control and dictate the manner and method by which TWA acquired aircraft and the necessary financing therefor" (Doc. 18, p. 5). The Second Circuit agreed that the judgment was based on "the illegality of Toolco's arrogation of all authority for buying aircraft * * *" (449 F.2d at 71, App. A-2776). The "control and dictat[ion]," the "arrogation of all authority," consisted of decisions by Toolco as to when jets should be ordered, whether they should be ordered by Toolco or TWA, how many of the jets ordered were needed by TWA, and whether TWA should lease aircraft for a time until financing could be arranged to purchase them.

As will be demonstrated in Point V, such conduct is completely outside the scope of the antitrust laws. Nevertheless, for present purposes it may be assumed that somehow or other—and the courts below never defined how—the "arrogation of all authority" in some way could have something to do with a violation of the antitrust laws, if only because the complaint so alleges. Whatever antitrust violations may be alleged in the complaint, the fact remains that the damages awarded are solely because Toolco controlled TWA and made decisions that TWA at the damage hearing claimed were wrong.

The CAB twice approved the acquisition of control of TWA, under § 408 of the Federal Aviation Act, and it subsequently approved all transactions between Toolco and TWA, including the temporary leases. Section 414 immunizes any person affected by an order under § 408 from antitrust or other legal restraints to the extent "necessary

to enable such person to do anything authorized, approved or required by such order." It was necessary to Toolco's CAB-approved control of TWA that it make decisions of the kind now complained of for TWA. The CAB, in approving the control, was fully aware that Toolco, if permitted to control, would make these decisions. The power to decide is the power to decide unwisely as well as to make decisions that appear wise in retrospect. If Toolco had not exercised its control over TWA it would have failed to do precisely what the Board by its § 408 order authorized Toolco to do. Yet TWA is now awarded an astronomical sum because Toolco did exercise control. That exercise is now found to be an illegal arrogation of authority.

When this case was first presented to the Court of Appeals in 1964 for interlocutory review of jurisdictional questions, that court ruled that while immunity under § 414 covered the acquisition of control, it could not be said to embrace every conceivable act in the exercise of that control that might possibly constitute a boycott, a tying arrangement, or an attempt to monopolize (332 F.2d at 608, 610, App. A-337-338, A-344). Arguably that was a reasonable decision at that time, when there was nothing before the Court of Appeals but the complaint. But the record of the damage hearing has narrowed the terms of reference from the limitless realm of the possible to a contained set of facts. The damage hearing revealed that the Toolco actions relied upon by TWA were the normal and natural incidents of parental control of a subsidiary. As we shall show later in this section of the argument, it is possible to hypothesize things that Toolco might have done, because

of its relation to TWA, that would not have been within the scope of the approval and the resulting antitrust immunity. The damage hearing has established that these kinds of things are not what this case is about.[18] It is about exactly the kinds of things that the CAB authorized Toolco to do.

Even if the actions of Toolco specified at the damage hearing might, absent CAB approval, have raised questions under the Sherman and Clayton Acts—and we undertake to show in the next section of the brief that they would not —Congress in § 408 specifically reserved for the CAB the task of applying antitrust considerations, along with other public interest factors, in determining whether control relationships like that between Toolco and TWA should be established and maintained, and in § 414 it immunized those relations, when approved by the CAB, from the antitrust laws. This Court has recognized that a meaningful exemption from the antitrust laws is necessary for the Board to effectuate the "regulatory scheme" that Congress intended to create. The key case is *Pan American World Airways, Inc.* v. *United States*, 371 U.S. 296 (1963), the so-called *Panagra* case. Pan American and W. R. Grace

[18] A further reason why the case is in a different posture now than it was in 1964 is that a major portion of the complaint sets out claims for purported violations of the antitrust laws after the voting trust took control of TWA in 1960. Both the Second Circuit on the interlocutory appeal and the CAB in its memorandum filed with this Court when the case was here before relied in part on an argument that the Board no longer had jurisdiction over Hughes and Toolco after Toolco relinquished control in 1960 and that there could be no immunity for post-1960 conduct (332 F.2d at 609, App. A-339); Memorandum of the Civil Aeronautics Board as Amicus Curiae at 18, *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 380 U.S. 248 (1965)). At the damage hearing TWA abandoned its claims concerning the post-1960 events, as well as its claim of conspiracy with Atlas Corporation to merge TWA with Northeast Airlines, and was awarded damages solely for events that occurred in the exercise of Toolco's control of TWA.

& Co. had jointly established a South American airline, Panagra. A government antitrust action charged that the two owners had unlawfully agreed upon a division of South American routes between Panagra and Pan American and that Pan American had used its 50% control of Panagra to prevent the latter from securing CAB authority to operate from the Canal Zone to the United States. This Court held that the complaint should have been dismissed because the Board had exclusive jurisdiction of the matters alleged in the government's complaint. The Court made particular mention of affiliations approved by the Board under § 408:

> It would also be odd to conclude that an affiliation between a common carrier and an air carrier that passed muster under § 408 should run afoul of the antitrust laws. Whether or not transactions of that character meet the standards of competition and monopoly provided by the Act is peculiarly a question for the Board, subject of course to judicial review as provided in 49 U.S.C. § 1486. [371 U.S. at 309.]

We first discuss the pertinent provisions of the Federal Aviation Act, as well as its legislative history, to show the extensive mandate Congress gave to the Board over antitrust questions. We then examine the various orders of the Board with regard to Toolco's control of TWA. Finally, we examine the facts relied upon for the award of damages to show that they were within the CAB's approval of control and were thus immunized from the effects of laws other than the Federal Aviation Act.

A. The Statutes

When the CAB involved itself in the relationship between Toolco and TWA, it was not performing merely a ministerial function. It was discharging a broad and meaningful responsibility arising from a number of provisions of federal law that were the outgrowth of very serious congressional consideration. The statutes themselves leave little doubt of the mandate Congress gave to the Board.

Most important in the context of this case is § 408(a)(5) of the Federal Aviation Act, which provides that an order of approval by the Board is required where control of an air carrier is to be acquired by another air carrier, by a common carrier, or by a person "engaged in any other phase of aeronautics." Section 408 (b) charges the Board to hold public hearings into proposed acquisitions of this kind and not to approve any that "would result in creating a monopoly or monopolies and thereby restrain competition * * *."

Section 409(a) of the Act sets forth a related requirement for Board approval before persons described above can establish interlocking directorships or interlocking officer relationships. Section 411 of the Act gives the Board power to enjoin after notice and hearing "unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof." In terms that section is limited to air carriers, but in *Panagra* the Court implied that the Board was free to utilize a broad definition of the term, "air carriers," in order to exercise authority over anticompetitive practices by persons exercising control over an air carrier. 371 U.S. at 311.

In performing its duties under these and other sections of the FAA, the Board is required to measure the public interest in terms of six factors specified in § 102 of the Act, and is charged with "the encouragement and development of an air transportation system * * *," "foster[ing] sound economic conditions" in that transportation, and "the promotion * * * of civil aeronautics."

The responsibility lodged with the Board to prevent anticompetitive abuses of a control relationship continues undiminished after initial approval. Section 408(b) states that Board approval of acquisition of control is to be "upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe * * *." It is quite common for the Board to insure continuing supervision by incorporating in approval orders a prohibition against transactions that exceed a specified dollar amount between the controlling party and the carrier and a requirement of special reports detailing dealings between a controlling party and a carrier.[19]

In these cases the Board retains "jurisdiction over the agreement to assure that no anticompetitive practices occur and to impose additional conditions if unforeseen contingencies arise." *National Aviation Trades Assn.* v. *CAB*, 420 F.2d 209, 221 (D.C.Cir. 1969). The Board has statutory authority under § 408(e) to investigate, either on complaint or on its own initiative, to determine whether the restrictions on control are being violated and may require an offender "to take such action, consistent with the provisions

[19] *E.g., Trans World Airlines, Inc., Acquisition of Sun Line Companies*, Order No. 71-1-4, January 4, 1971; *California Eastern Aviation, Inc., Control*, 26 C.A.B. 272, 287 (1958); *Davis-Cutler, Acquisition of Control*, 23 C.A.B. 766, 770 (1956); *Central Airlines, Inc., Control*, 10 C.A.B. 538, 545 (1949); *The Florida Case*, 6 C.A.B. 961, 1001 (1946).

of this chapter, as may be necessary, in the opinion of the Board, to prevent further violation of such provision." Thus the Board can investigate and remedy any change in the activities of either of the parties that it fears may have undue anticompetitive effects. Still another provision, § 1002 (b), (c), gives general authority to the Board to investigate whether any person has failed to comply with any provision of the FAA or any requirements established by the Board thereunder and to compel compliance with the Act if it finds a violation. Finally, § 1005(d) empowers the Board "to suspend or modify" any order "upon such notice and in such manner as [it] shall deem proper." If a control relationship should develop along undesirable lines, or in an unexpected manner, the Board has ample power under the provisions just cited to withdraw its approval or otherwise to remedy the matter.[20]

The foregoing review of the Board's statutory authority demonstrates the seriousness of purpose with which Congress acted in turning over to the Board the responsibility for controlling anticompetitive abuses in the business of air transportation. If there were any doubt that Congress wished the CAB to be the principal moving force in this area, it would be removed by § 414. That section relieves any person affected by an order under §§ 408, 409, or 412 of the Act from antitrust or other legal restraints to the extent "necessary to enable such person to do anything authorized, approved or required by such order."

---

[20] The Board also has power to keep itself informed about the relationships of parties after it has approved control. Under § 408(d) the Board can subject the controlling party to the same requirements relating to accounts, records, and reports as an air carrier. Section 415 allows the Board to require from the controlling party "full and complete reports and other information." The Board has in fact promulgated elaborate reporting regulations. 14 CFR §§ 200 *et seq.*

The broad power vested in the CAB on the face of the statutes is confirmed also by the legislative history of the relevant provisions. Section 7 of the Air Mail Act of 1934, 48 Stat. 936, had prohibited control of an air carrier by a company engaged in any phase of the aviation industry.[21] In 1935 a Federal Aviation Commission, appointed by President Roosevelt to recommend a comprehensive policy for protecting the public interest in light of the rapid growth of the aviation industry, urged that that blanket prohibition should be relaxed and that responsibility for protecting the public interest against anticompetitive practices in the industry should be turned over to a new regulatory agency. The agency would be in a position to preserve competition while balancing this against other public interest considerations, since "the door should be left open as far as possible for a free flow of investment capital into air transportation in the interest of a strengthening of its structure and the improvement of its facilities." *S. Doc. No. 15*, 74th Cong., 1st Sess. 69 (1935). Congress responded to this recommendation in the Civil Aeronautics Act of 1938, 52 Stat. 973, reenacted without substantive change, so far as the presently relevant provisions are concerned, in the Federal Aviation Act of 1958, 72 Stat. 731. As the Court said in *Panagra*, "since 1938, the industry has been regulated under a regime designed to change the prior competitive system." 371 U.S. at 301.

In the Senate debates on the 1938 statute, Senator McKellar questioned the wisdom of giving a commission the

[21] Prior to the 1934 Act, the control of air carriers by airplane manufacturers and holding companies had led to abuses. *Hearings Before the Special Senate Committee on Investigation of Air Mail and Ocean Rail Rates*, 73rd Cong., 2d Sess. (1934).

power to permit combinations in restraint of trade. Senators Truman and McCarran responded by emphasizing the fullness and completeness of antitrust authority intended to be exercised by the new agency under the Act. 83 Cong. Rec. 6728-6729 (1938). The statute delineated the authority of the CAB to enforce antitrust policies more explicitly than in any similar regulatory legislation.[22] Both the statutes and the legislative history teach that the Board was and is intended to control the relation of antitrust policies to other considerations of the public interest in a broad and meaningful way, without any fear of intrusion from any other governmental body.

B. The CAB Orders

As we noted at the outset of this section, TWA says that the "crux" of its complaint involves Toolco's use of its control over TWA "to control and dictate the manner and method by which TWA acquired aircraft and the necessary financing therefor" (Doc. 18, p. 5). The courts below held that these activities were not necessarily within the scope of the various orders entered by the CAB pursuant to § 408. Yet an examination of the orders reveals that their subject matter consists precisely of what TWA calls the "crux" of its complaint. Further, the records pertaining to the orders indicate the Board's active and continuing concern with the very factual "backdrop" that TWA brought forward at the damage hearing. If the result below is sustained, the purported exemption from the antitrust laws expressed in § 414 is a dead letter and the CAB can exercise no meaningful function under § 408.

---

[22] See, *e.g.*, the comparable provisions of the Shipping Act, 46 U.S.C. § 814, the Interstate Commerce Act, 49 U.S.C. §5(2), the Federal Communications Act, 47 U.S.C. §§ 221, 222, and the Federal Power Act, 16 U.S.C. § 824b.

The orders of the Board approving Toolco's control of TWA are described in the Statement of Facts.[23] The basic order, issued in 1944, approved the acquisition by Toolco of approximately 45% of the common stock of TWA (6 C.A.B. 153, App. A-3297). A modifying order in 1950 permitted TWA to increase its stock ownership to more than 70% and to seat a majority of Toolco nominees on the TWA board (12 C.A.B. 912, App. A-3333).

Conditions imposed by the Board in its 1944 order, reaffirmed in 1950, limited transactions between the companies to those "involving complete items of property, the price of which does not exceed $200 each, with the further limitation that the total annual expenditure involved in such commercial transactions by either party shall not exceed $10,000" (6 C.A.B. at 158, App. A-3306). Thus from 1944 to 1960 every acquisition or lease of aircraft by TWA from Toolco and each financing of TWA by Toolco required specific Board approval. The various applications filed by TWA with the Board requesting this approval described in detail the nature of the transactions, the reasons for them, and their benefit to TWA. Extensive exhibits containing the terms and conditions of the transactions accompanied each application. The orders issued by the Board approving the transactions were based on § 408 and were in the form of modifications to the original control order (App. AX-2202, AX-2226, AX-2237, AX-2245, AX-2260). Thus the Board regarded its transactional orders as continuations of the original proceeding approving Toolco's acquisition of control. Each of the modification orders rested on a stated finding by the Board that the transactions were "just and reasonable and in the public interest" (*e.g.*, App. AX-2261).

---

[23] Pp. 6-9, *supra*.

The orders reflect on their face a process of continuous and comprehensive supervision by the Board, in precisely the manner that Congress intended. This is confirmed by the hearings that preceded the basic control orders in 1944 and 1950.

In its opinion accompanying the 1944 order (6 C.A.B. 153, App. A-3297) the Board examined in great detail the specific effects upon competition of the foreseeable actions that Toolco might take with respect to TWA once control was approved. It was precisely because Toolco had the rights to purchase planes, some of which might be held for resale to commercial airlines, that the Board found that Toolco was potentially a dealer and thus was engaged in a phase of aeronautics, so that Board approval of Toolco's control was required (6 C.A.B. at 156, App. A-3302). The Board was aware that it was Toolco that had contracted with Lockheed for the purchase of Constellations, intended for TWA, and that that arrangement had been made "to give TWA the benefit of the credit and financial standing of Hughes Tool in a transaction involving substantial financial responsibility" (6 C.A.B. at 155, App. A-3300-3301). The Board noted the possibility that TWA might be "forced," through Toolco's control, to purchase more planes than TWA's needs required and said that it was imposing conditions to "insure against any temptation which may later come to [Toolco] to take advantage of the relationship to its own profit and to the detriment of the public interest" (6 C.A.B. at 156, App. A-3302-3303). It found that the limit it put on transactions between Toolco and TWA would "protect the public interest from any improper coercion of the air carrier by a controlling company on account of any interest which that controlling company may have in some other phase of aeronautics" (6 C.A.B. at 157, App. A-3304).

When Toolco proposed to increase its stock interest in TWA from 45% to more than 70%, as a part of a financing scheme to rescue TWA from impending bankruptcy shortly after the war, the CAB found that this would be a further acquisition of control, for which its approval was required (9 C.A.B. at 381, App. A-3320). It ordered a hearing to determine if this further acquisition would be consistent with the public interest. That hearing ranged over the entire 14-year history of the Toolco relationship to TWA and the full spectrum of activities involved. Toolco's management policies were subjected to close analysis in the very areas for which TWA has now been awarded damages. Careful scrutiny was given to Toolco's participation in the acquisition of equipment by TWA (12 C.A.B. at 207, 210, 217, App. A-3363-3364, A-3368-3369, A-3383) and to the role of Toolco in obtaining financing for TWA (12 C.A.B. at 208, 216-217, App. A-3365-3366, A-3382-3383). The Board knew that "TWA was required to come to Toolco to obtain consent of the latter before purchasing additional equipment" (9 C.A.B. at 391 n. 18, App. A-3330) and that in practice it was Toolco that contracted with manufacturers for planes intended for TWA (12 C.A.B. at 208, App. A-3365).

The Board, in its 1944 and 1950 orders, did not merely approve the acquisition by Toolco of a financial interest in TWA. It approved, as § 408(a)(5) requires and as its orders show on their face, acquisition of "control." The Board's public counsel was unhappy with the further acquisition in 1950, and noted the possibility that the Board might require that the additional stock to be acquired by Toolco not be voted, but even he thought that such a limitation would be impractical and undesirable (12 C.A.B. at 215, App. A-3380). It was with regard to these particular

parties that the Board defined "control" as used in § 408 as meaning "the existence of a right or power to direct or dominate, whether actually exercised or existing in potential use" (9 C.A.B. at 386, App. A-3321). It was aware that the further acquisition would give Toolco "complete actual and legal control" (12 C.A.B. at 197, App. A-3342), that Toolco would "manage and direct the usual day-to-day business and financial affairs of the airline" (9 C.A.B. at 387, App. A-3323), and that Toolco had not been willing to give further financial assistance to save TWA from bankruptcy "without assurance that the management of the carrier would be replaced and the carrier reorganized and run in agreement with the wishes of the principal stockholder and/or its representatives" (12 C.A.B. at 206, App. A-3360).

With all of this knowledge before it, and with full understanding of exactly what control by Toolco would mean, the Board approved the further acquisition of control. The record showed that benefits to TWA from having Toolco as its principal owner had been "real and substantial" (12 C.A.B. at 216, App. A-3381). Toolco's continued engagement in certain phases of aeronautics was in the public interest and did not conflict with its control of an air carrier (12 C.A.B. at 216, App. A-3381). The record did not permit "any other conclusion than that * * * the further acquisition of control should be approved as being consistent with the public interest and the requirements of the Act" (12 C.A.B. at 193, App. A-3334).

In the light of all that the Board knew and of all that it said, the conclusion is inescapable that the Board, with its eyes wide open, approved giving Toolco the power "to control and dictate the manner and method by which TWA

acquired aircraft and the necessary financing therefor." Far from being an illegal "arrogation of all authority," this was a legitimate exercise of power approved by the Board under § 408 and thus immunized by § 414.

C. The Damage Award

Whatever may have seemed to be the case in 1964 when the Second Circuit considered the immunity issue on the basis of the complaint alone, it is now clear that the damages awarded to TWA are based on decisions that Toolco made for its subsidiary about acquisition and financing of aircraft and are, therefore, for exercising precisely that control that the Board authorized Toolco to have.

(1) The largest item in the award, $27.6 million before trebling, was for late delivery of jet aircraft and because the jet fleet was cut back to 47 planes rather than the 63 planes originally ordered. The initial order for Boeing jets was given promptly after negotiations with Convair about manufacture by that company of a long-range jet suited to the unique requirements of TWA had fallen through. The jet orders were reduced in 1959 when Toolco, in consultation with TWA, determined that the larger fleet of first-generation jets was not needed. Whatever may be said in hindsight about the sagacity of these management determinations, it is difficult to think of decisions that are more traditionally the type of business judgment that a parent would make concerning the policies of its subsidiary. "'* * * [I]nevitably the controlling company, by virtue of its investment in the acquired carrier, will endeavor to make itself accountable—as indeed the acquirer here under scrutiny had—for the managerial efficiency, the operating economy, and the financial integrity of the controlled car-

rier" (12 C.A.B. at 196, App. A-3341). The discussion earlier of the CAB control orders shows that the Board was fully aware, when it approved the acquisition of control, that Toolco would make decisions of this kind for TWA. As late as December, 1960, the Board said that "we have not been unaware of TWA's problems" and pointed to the fact that TWA had not arranged financing for its jet fleet as early as had its major competitors and that it had ordered fewer planes than they had. *Trans World Air., Control by Hughes*, 32 C.A.B. 1363, 1364-1365 (1960) (App. A-3403, A-3408-3409). Yet with that awareness the Board took no action to revoke its approval of control[24] and instead approved, as modifications of the original control orders, each of the transactions by which TWA acquired jets.

(2) The award of $5.3 million before trebling because some of the jet aircraft were temporarily leased by TWA from Toolco is an even more obvious example. The decision that the planes should be leased to the airline until permanent financing could be arranged was well within the general control approved by the CAB in 1944 and 1950 and, in this instance, it was the subject of specific Board approval. In five separate orders the Board approved the lease of planes from Toolco to TWA, finding that these transactions "do not violate the original purpose of the Board in impos-

---

[24] The Board on its own motion did order an investigation in 1956 when thought was briefly given to Toolco's manufacturing jets for TWA. See note 51, p. 109, *infra*.

On June 23, 1960, the Board approved a proposed plan for permanent financing that could have increased Toolco's ownership of TWA stock from 78% to 90%. The Board found that "in view of the overwhelming control" already exercised by Toolco, "any increase of control is insignificant and does not call for a reexamination of the relationship under section 408". *Trans World Air., Control by Hughes*, 31 C.A.B. 982, 983 (1960) (App. AX-2287, 2288).

ing the restrictions contained in Order 3210, and * * * [are] just and reasonable and in the public interest."[25] Even if, as TWA claims, the Board was unaware of, and did not approve, a supposed condition accompanying the leases that TWA would thereafter purchase aircraft only from Toolco, this does not alter the situation. The Board had been fully aware, from at least 1950, that Toolco would decide what planes TWA would acquire and that Toolco would be the nominal purchaser of planes for TWA's use.[26] Furthermore, the acquisition thereafter of any aircraft by TWA from or through Toolco would be subject to CAB approval under § 408.

(3) Somewhat more than half a million dollars, before trebling, was based on added personnel costs to TWA because certain Convairs were not delivered on the schedule that had been agreed to. TWA's case is that these delays would not have occurred had not Toolco controlled TWA, but again the point is that this control was approved by the CAB and thus immunized from the antitrust laws.

(4) The $12.4 million before trebling awarded because of retroactive application of changes made in TWA's accounting practices 2½ years after this suit was instituted are dependent on the validity of the other three awards of damages. They have no independent significance for purposes of the control relationship and its status under § 408.

---

[25] Orders E-13542, Feb. 26, 1959 (App. AX-2202); E-13873, May 15, 1959 (App. AX-2226); E-14169, July 1, 1959 (App. AX-2237); E-14504, Sept. 30, 1959 (App. AX-2245); E-14877, Jan. 29, 1960 (App. AX-2260).

[26] Further, as discussed at pp. 142-145, *infra*, the damages were awarded because leasing is costlier than purchase, not because of the supposed condition.

D. The Decisions Below

The decision by the Court of Appeals that §414 is no bar to the recovery here will result in confusion about the proper role of the courts in relation to the Board and about the extent to which one who acquires control of an air carrier with CAB approval can rely on an order by the CAB approving a transaction as a grant of antitrust immunity in conducting the normal business affairs of a company with such a control relationship. The decision leaves it to the courts to determine when an approved transaction is immunized and when it is not, depending on such subjective criteria as the "backdrop" and the court's perception of the extent to which the CAB was aware of all the facts. But the scope of the Board's power to confer immunity does not turn, as the Court of Appeals mistakenly thought, on whether the courts or the Board are more competent to pass on antitrust matters. Congress has given an express power to confer immunity in § 414. It did so for a purpose —to enable the Board to fashion and apply a competitive standard in the light of public interest factors detailed in § 102 of the Act. "It is not for this Court, or any other, to override a policy, or an exemption from one, so clearly and specifically declared by Congress, whatever may be our views of the wisdom of its action." *McLean Trucking Co.* v. *United States*, 321 U.S. 67, 79 (1944).

Thus it misses the mark to say that the Board is not "any more qualified to consider such charges than the federal courts, which daily encounter and resolve antitrust problems" (332 F.2d at 609, App. A-341). The whole point is that Congress has determined that the extent of permissible competition in the aviation industry is too complex to

be resolved only in antitrust terms. As the Court noted in *Panagra*, the Board "has its special standard of the 'public interest' as defined by Congress. * * * If the courts were to intrude independently with their construction of the antitrust laws, two regimes might collide." 371 U.S. at 308, 310.

Congress has directed the Board to make a broader inquiry than is open in an antitrust action. Under the first proviso of § 408 the Board is prohibited from approving any transaction that "would result in creating a monopoly or monopolies and thereby restrain competition * * *." At the same time, the Board itself "has properly concluded, in light of the immunity from the antitrust laws conferred by § 414, that it must consider anti-competitive effects less extreme than those limned in the proviso in determining whether the transaction will 'be consistent with the public interest,' as defined in § 102 * * *." *Butler Aviation Co.* v. *CAB*, 389 F.2d 517, 519 (2d Cir. 1968). See also *National Aviation Trades Assn.* v. *CAB*, 420 F.2d 209, 213 (D.C.Cir. 1969). But if there is an anticompetitive effect short of a monopoly, the Board may still approve if it finds that, in the light of all the factors listed in § 102, the overall effect is in the public interest. Sections 408 and 414 become meaningless if a court, taking a monocular view of only the effect on competition, can award huge damages for a transaction that the Board, after carefully weighing any injury to competition against the benefits that the transaction will provide, has found to be in the public interest.[27]

---

[27] Thus Professor Davis notes that "* * * the congressional policy expressed in the Federal Aviation Act includes both something more and something less than the antitrust policy." He suggests that a proper accommodation of CAB regulation with the antitrust laws is to limit judicial action applying antitrust policies to proceedings on judicial review of Board orders. Davis, *Administrative Law Treatise* § 19.06, at 634 (1970 Supp.).

Suppose, for example, that when TWA was on the verge of bankruptcy in 1946, the only company with sufficient resources and interest to enable TWA to survive had been Lockheed. Suppose further that the CAB approved acquisition of control by Lockheed, recognizing the obvious restriction on competition from such a vertical integration but finding that that was outweighed by the public interest in having a strong and solvent TWA. On the theory of the court below, Lockheed would have been vulnerable to an antitrust action if, while it exercised control, TWA, with CAB approval, had purchased Lockheed planes.

The Board understands its powers in this regard. See, for example, its recent order authorizing joint action by TWA, American, and United to reduce scheduled capacity in certain markets. *Application of Trans World Airlines, Inc., et al.*, Order 71-8-91 (August 19, 1971). The Board expressly noted that this joint action was inconsistent with the antitrust laws but approved it—and thereby gave antitrust immunity, 41 Op. Atty. Gen. 333 (1957)—because of the financial distress the industry is suffering. The Board said, at 5, that

> in the present unusual circumstances, approval of the three-carrier agreement notwithstanding its inconsistency with the antitrust principles is required to meet serious transportation needs and secure important public benefits.

In the present case antitrust liability was found on the novel theory of what was termed "potential competition." Yet it was precisely because such "potential competition" existed, that is, because Toolco's aeronautics activities made it conceivably a potential supplier to air carriers, that Toolco's acquisition of TWA required CAB approval. Whatever "independent economic significance" Toolco can be said to

have had, or whatever "potential competition" it may have represented, was the basis of the CAB's original interest in the relationship and was examined at great length by the Board prior to each of its approvals (6 C.A.B. at 155-156, App. A-3299-3301; 9 C.A.B. at 382, App. A-3314; 12 C.A.B. at 216, App. 3381).

It is true, as noted in *Panagra*, that the Federal Aviation Act has not completely displaced the antitrust laws, and that "on the civil side violations of antitrust laws other than those enumerated in the act might be imagined." 371 U.S. at 305. This was said in discussing the Board's authority under § 411 and that section is not among the sections specified in § 414 in defining immunity. The Court's remark just quoted was in a context "apart from orders which give immunity from the antitrust laws by reason of § 414 * * *." *Ibid.* Nevertheless it is possible to imagine acts that a controlling company might do, by virtue of its control of an air carrier, that would not be within the immunity conferred by a § 408 order. Suppose, for example, that Toolco refused to sell drill bits except to companies that agreed to patronize TWA whenever possible. Or that Toolco agreed to buy only Boeings for TWA in exchange for Boeing's agreement to buy all its drill bits from Toolco. Arrangements of this kind with third parties might well be outside the scope of the immunity. But that is not our case. We have here only the normal exercise of the controlling party's right to make important decisions for its subsidiary. This is at the heart of the Board-approved control and thus of the § 414 immunity.

In *Panagra*, the Court went on to say:

> Limitation of routes and divisions of territories and *the relation of common carriers to air carriers* are basic in this regulatory scheme. The acts charged in

> this civil suit as antitrust violations are precise ingredients of the Board's authority in granting, qualifying, or denying certificates to air carriers, in modifying, suspending, or revoking them, *and in allowing or disallowing affiliations between common carriers and air carriers.* [371 U.S. at 305; emphasis added.]

Equally the relation between air carriers and persons engaged in aeronautics is "basic in this regulatory scheme" and is a "precise ingredient" in "allowing or disallowing affiliations." Congress has said that what the Board has joined together it is not for the antitrust court to rend asunder.

TWA has suggested that the Board "is without jurisdiction under the Federal Aviation Act over either the acquisition of equipment by air carriers or their financing." Brief in Opposition to Certiorari at 44. It is difficult at this late date to suggest that the restrictions the Board imposed in its original orders on acquisition of equipment and the series of subsequent orders approving particular equipment acquisitions and financing arrangements were all *ultra vires* and that the Board for nearly 30 years has been arrogating an authority it does not have. The unsoundness of this suggestion can be easily illustrated. Suppose that Toolco had obtained and resold to TWA the full 63-jet fleet originally ordered. Suppose that the Board, conscious of the possibility "that TWA might be forced, through the control exercised by Hughes Tool, to purchase more than the economic operations of TWA require * * *" (6 C.A.B. at 156, App. A-3302), had carefully examined the transaction and approved TWA's acquisition of that many jets from Toolco. On TWA's narrow view of the Board's jurisdiction, TWA could now claim substantial antitrust dam-

ages for the money it lost if, with hindsight, 63 jets turned out to be more than it needed, and it could do this despite CAB approval of acquisition of that large a fleet.

The decision below reflects a lack of confidence in the administrative process that Congress saw fit to establish and in the ability of the Board to make knowledgeable decisions. Since 1938 Congress has carefully evolved a system considered by it to be most appropriate for promoting the orderly development and functioning of the commercial aviation industry in this country. Congress intended that the Board should have the responsibility, within a broad regulatory scheme, for adjusting competitive practices within the aviation industry to make possible the provision of assistance to carriers from various segments of the industry and the economy when that is found to be in the best interests of the public.

The case history of the relation between Toolco and TWA reflects that through the use of control of the carrier by Toolco, as approved by the Board, Toolco rescued TWA from financial disaster after World War II, developed TWA's air fleet, aided it in becoming one of the most important air carriers in the country, and assisted it in entering the jet age. Perhaps, as the new management of TWA contends, Toolco made some mistakes in the course of its exercise of control, but in human affairs it would be unusual if this were not the case. The courts below have, in effect, found Toolco's stewardship to have been unlawful by measuring it against the rigid principles of the antitrust laws rather than by the more supple test of the public interest that Congress has provided for this industry.

The decision below is plainly inconsistent with §§ 408 and 414 of the Act and with this Court's holding in *Panagra*. At a time when many air carriers are in difficult finan-

cial circumstances, the decision below, if affirmed, would effectively deter anyone else in any phase of aeronautics from coming to a carrier's assistance, because the antitrust immunity that CAB approval and § 414 seem to confer would have become "only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper's will." *Edwards* v. *California*, 314 U.S. 160, 186 (1941) (Jackson, J., concurring).

V. The Acts of Defendants Were Not In Violation of the Antitrust Laws.

In the preceding point of the Argument we have discussed the effect on antitrust liability of CAB approval of acquisition of TWA by Toolco and of the transactions between them. For purposes of the present point we assume that the effect of CAB approval is narrower than we have there contended and that the antitrust immunity, granted by § 414 of the Federal Aviation Act and by the last sentence of § 7 of the Clayton Act, extends to the acquisition of control itself but not to the exercise of control. Even on that assumption, the acts of defendants alleged in the complaint are not violations of the antitrust laws.

The complaint alleged that Toolco had restrained and monopolized the trade and commerce of supplying aircraft to air carriers in general and to TWA in particular. Basically it asserted that the defendants foreclosed suppliers of aircraft other than Toolco from supplying the TWA market. So long as TWA could rely on the conclusory allegations of the complaint it could perpetuate the myth that TWA was forced to buy Toolco planes instead of planes of other manufacturers and suppliers. The damage hearing exposed this for the myth it was. TWA was not awarded damages because any other supplier was excluded from the TWA mar-

ket nor because of any restraint on trade of suppliers; the award is based entirely on harm TWA claims to have suffered because Toolco decided for TWA when and how TWA would acquire planes from Boeing and Convair.

Though this case has gone on for many years and produced many decisions from the courts below, at no point has any court specified how defendants' acts violated the statutes plaintiff relies on. The Court of Appeals thought that "the default had the effect of admitting or establishing that the acts pleaded in the complaint violated the antitrust laws * * *" (449 F.2d at 70, App. A-2772). Apparently it lacked full confidence in that position—and wisely so, as we have shown in Point II of the Argument. Accordingly it outlined six different theories on which it thought that an antitrust violation could be found (449 F.2d at 68-69, App. A-2770-71). All six of those theories are fatally undercut by one or both of the following two facts: (1) Toolco was lawfully the parent of TWA; and (2) Toolco was not in competition with manufacturers or suppliers of commercial aircraft.

A. The Parent-Subsidiary Relationship

Because the Court of Appeals ignored the significance of the fact that Toolco and TWA were not independent entities, and that Toolco was lawfully in control of TWA by its 78% stock ownership, approved by the CAB, the court below has awarded $145 million in damages under the antitrust laws for what is at most a mismanagement claim. The court below thought that the judgment was based on "the illegality of Toolco's arrogation of all authority for buying aircraft

* * * " (449 F.2d at 71, App. A-2776), when in substance TWA's claims amounted to nothing more than that normal management decisions made by Toolco for its subsidiary were detrimental to TWA.

A controversy between these two Delaware corporations about mismanagement would have been litigated in a state court and TWA's recovery of *single* damages would have been conditioned on a showing that Toolco had breached its fiduciary duties and had been guilty of "gross and palpable overreaching."[28] The Court of Appeals, by ignoring the critical importance of the parent-subsidiary relationship, has allowed a *three-fold* recovery of damages without even a threshold showing of the elements of a mismanagement claim.[29]

The supposed "arrogation of all authority" consisted of Toolco's deciding that it would order jet aircraft for TWA instead of TWA's ordering precisely the same aircraft from the same manufacturers, the decision as to when these aircraft should be ordered, the later determination that it

---

[28] *E.g., Sinclair Oil Corp.* v. *Levien*, 280 A.2d 717, 722 (Del. 1971); *Getty Oil Co.* v. *Skelly Oil Co.*, 267 A.2d 883, 888 (Del. 1970); *Meyerson* v. *El Paso Natural Gas Co.*, 246 A.2d 789, 794 (Del. Ch. 1967). See generally Note, *The Fiduciary Duty of Parent to Subsidiary Corporation*, 57 Va.L.Rev. 1223 (1971).

[29] TWA can hardly assert that the facts are unrelated to a mismanagement claim. After instituting the instant action in federal court, TWA filed a mismanagement suit in the Delaware Court of Chancery alleging substantially the same facts it had set forth in its antitrust complaint. As a matter of fact, the federal complaint, stripped of its antitrust verbiage and with the added claims of mismanagement and violation of fiduciary duties, is identical for all practical purposes with the state complaint. That state action has not yet been dismissed.

would be unwise to acquire too many first-generation jets and that TWA should take only 47 of the 63 jets initially ordered, and the decision that TWA should lease aircraft for a time until financing could be obtained to purchase them.

If Toolco, by virtue of monoply power or huge resources or predatory tactics, had been able to force decisions of this kind on an independent TWA, the case might arguably fit within antitrust concepts. But for Toolco to make these decisions for a subsidiary it has lawfully acquired was merely to do what a parent normally does. This Court has recognized repeatedly that dealings that would be antitrust violations if engaged in by independent entities can be lawful if the parties are parent and subsidiary. In *United States* v. *Columbia Steel Co.*, 334 U.S. 495 (1948), for example, the Court established that exclusive dealing between parent and subsidiary is a lawful and normal business practice, even though it might well violate the antitrust laws if the companies were unrelated.

> A subsidiary will in all probability deal only with its parent for goods the parent can furnish. That fact, however, does not make the acquisition invalid. [334 U.S. at 523.]

A fortiori the dealings themselves are not illegal. See also *Standard Oil Company of California* v. *United States*, 337 U.S. 293 (1949), where the Court held that an exclusive dealing arrangement imposed on independent dealers violated § 3 of the Clayton Act though recognizing that the same arrangement could have been imposed on company agents, and *United States* v. *Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), explicitly distinguishing between inde-

pendent distributors and those whose function was essentially that of agents or salesmen in determining the propriety of restrictions on resale.

Commentators are agreed that parent-subsidiary relations are not subject to the same standards that govern independent enterprises.[30] The report to Attorney General Brownell by an eminent committee was quite emphatic on this point:

> It seems indeed inconceivable to hold *per se* illegal the mere fixing by a parent of a subsidiary's price or production, or the selection by the parent of those persons with whom its subsidiary may or may not deal. [*Report of the Attorney General's National Committee To Study The Antitrust Laws* 35 (1955).]

The fact of the matter, in view of the parent's responsibilities to its own shareholders, is that "the parent not only has a right to control its subsidiaries, but a duty to do so." Stengel, *Intra-Enterprise Conspiracy Under Section 1 of The Sherman Act*, 35 Miss. L.J. 5, 21 (1963).

At the heart of any antitrust claim is the concept that the offending party has wrongfully exercised, or sought to exercise, control over the economic and competitive decisions of an independent business entity. See *United States* v. *Topco Associates, Inc.*, 92 S.Ct. 1126, 1135-1136 (1972). Virtually every antitrust violation—price-fixing, tying, exclusive

---

[30] See generally Krause, *The Multi-Corporate International Business Under Section 1 of the Sherman Act — Intra-Enterprise Conspiracy Revisited*, 17 Bus. Law. 912 (1962); McQuade, *Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act*, 41 Va.L.Rev. 183 (1955); Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L.Rev. 20 (1968).

dealing, territorial allocations, exclusion of competitors—is based upon a defendant's attempt to control what he has no right to control—the prices of his competitors, his customer's choice of suppliers, a competitor's entry into a market. TWA, however, had no claim to economic independence, since it was lawfully acquired by Toolco as the courts below recognized (214 F. Supp. at 109, App. A-261; 332 F.2d at 608, App. A-336). TWA cannot complain that Toolco controlled what it had no right to control, but only that it did not exercise that control in a manner consistent with what TWA now claims were its best interests. That is a mismanagement claim rather than an antitrust claim.

A subsidiary does have standing under the antitrust laws to challenge the legality of its acquisition by its parent. *E.g., Gottesman* v. *General Motors Corp.*, 414 F.2d 956 (2d Cir. 1969), *cert. denied*, 403 U.S. 911 (1971); *Allis-Chalmers Mfg. Co.* v. *White Consolidated Indus., Inc.*, 414 F.2d 506 (3d Cir. 1969), *cert. denied*, 396 U.S. 1009 (1970). Once that legality has been established, however, as it has here by virtue of CAB approval, the subsidiary should not—and until this case, did not—have capacity to make antitrust claims concerning the mere exercise of parental control. The decision of the Court of Appeals creates a hitherto unimagined[31] potential for actions by subsidiary corporations and minority stockholders. If the arrogation of all authority for management decisions of a subsidiary is a violation of the antitrust laws, then any decision a parent makes for its subsidiary that appears wrong by the wisdom of hindsight will give rise to a claim for treble damages. No

[31] None of the commentators who have studied the question of intra-enterprise conspiracy—see note 30, *supra*—has considered the possibility of a subsidiary suing its parent for restraining the subsidiary's trade. Until now the question has been whether and when a third party or the government could successfully claim that corporate affiliates had conspired with one another.

need will remain to prove breach of duty or "palpable overreaching," and damages caused by a parent's misjudgment will be recoverable thrice over. All the subsidiary need do is invoke the language of antitrust to create exclusive federal jurisdiction over what until now has been a state law claim that in many instances could only be brought in the state courts.[32] With the tantalizing prospect of treble damages as a lure, few plaintiffs are likely to resist the invitation to make a federal case out of it.[33]

In the antitrust laws, as in the securities statutes, Congress "did not seek to regulate transactions which constitute no more than internal corporate mismanagement." *Superintendent of Insurance* v. *Bankers Life & Casualty Co.*, 404 U.S. 6, 12 (1971). The antitrust theories the Court of Appeals thought possibly applicable break down when applied in a parent-subsidiary context.

One theory mentioned by the Court of Appeals was "enforcement of an illegal boycott" (449 F.2d at 69, App. A-2770). The hypothesis fails for the simple reason that there was no "boycott." Each of the cases cited by the Court

---

[32] A different panel of the Second Circuit refused to convert a state claim into a more complex federal action when, one day before the decision in this case came down, it held that conclusory allegations in a complaint are not enough to "bootstrap" a "garden-variety customer's suit against a broker for breach of contract" into a violation of the Securities Exchange Act. *Shemtob* v. *Shearson, Hammill & Co.*, 448 F.2d 442, 445 (2d Cir. 1971).

[33] [T]his is one of those cases, not unfamiliar in treble-damage litigation, where injury resulting from normal business hazards is sought to be made redressable by casting the affair in antitrust terms." *Poller* v. *Columbia Broadcasting System, Inc.*, 368 U.S. 464, 474 (1962) (Harlan, J., dissenting). That this is the wrong moment in history to invite more antitrust suits is evident from the fact that the number of private antitrust actions commenced has increased from 228 in 1960 to 1445 in 1971. *1971 Annual Report of the Director of the Administrative Office* II-108.

of Appeals for this theory[34] involved an agreement by one group of enterprises not to deal with other businesses, with the objective of destroying the other businesses or coercing them into certain desired conduct.

In this case there is no credible suggestion, nor could there be, that Toolco's decision to purchase planes for TWA was designed to coerce or destroy Boeing, Convair, Douglas, or any other aircraft manufacturer. They could hardly have been coerced or destroyed since any loss of sales to TWA was replaced by sales to Toolco. From the viewpoint of these supposedly "boycotted" manufacturers, the "restraint" was no different from what occurs whenever any purchasing decision is made. A decision to buy from one firm is necessarily a decision not to buy from another, but that does not make the decision an unlawful restraint of trade or boycott. See *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918). That the decision is made by a parent for its subsidiary does not make unlawful a decision that the subsidiary could lawfully have made for itself. *Hudson Sales Corp.* v. *Waldrip*, 211 F.2d 268 (5th Cir.), *cert. denied*, 348 U.S. 821 (1954); *Alpha Distributing Co. of California* v. *Jack Daniel's Distillery, Inc.*, 207 F. Supp. 136 (N.D.Cal. 1961), *affirmed per curiam*, 304 F.2d 451 (9th Cir. 1962). If Toolco's decision that it, rather than TWA, would purchase aircraft—a decision that did not impinge in any way on the economic freedom of an independent party and that was made "to give TWA the benefit of the credit and financial standing of Hughes Tool * * *" (6 C.A.B. at 155, App. A-3300-3301)—was a boycott, then every parent's selection of suppliers for its

---

[34] *Fashion Originators' Guild* v. *Federal Trade Commission*, 312 U.S. 457 (1941); *Klor's Inc.* v. *Broadway-Hale Stores*, 359 U.S. 207 (1959); and *United States* v. *New York Great Atlantic & Pacific Tea Co.*, 173 F.2d 79 (7th Cir. 1949).

subsidiary can be converted into a boycott by denominating it as such in a complaint. See Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. Rev. 20, 49 (1968).

TWA acquired Boeing jets and Convair jets, not Toolco jets, and it wanted Boeing jets and Convair jets. To Boeing and Convair, whether TWA or Toolco ordered the jets was immaterial. Boeing viewed TWA and Toolco as one and the same customer, and the right to receive the planes could not be assigned without the consent of the manufacturers. Moreover, Boeing and Convair produced exactly the same number of jets and sold them at the same price, whoever placed the order. The decision to cut back on the orders permitted the sale or lease of certain of these jets to others but the trade of Boeing was in no way restrained or monopolized because with Boeing's consent Toolco assigned its orders for six aircraft and Boeing then sold the aircraft to Pan American. The same is true of the lease of the Convairs to Northeast. The leasing of jets to TWA pending permanent financing affected the manufacturers not at all (and even if it had, of course, the damage would have been to them rather than to TWA).

A second hypothesis on which the Court of Appeals thought an antitrust violation might be found was "tying adequate financing of TWA to its purchase or lease of jets from Toolco, and vice-versa" (449 F.2d at 69, App. A-2770). This hypothesis also fails when it is remembered that Toolco owned TWA. A tie-in between goods and financing can violate the antitrust laws, as *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495 (1969), cited by the Court of Appeals, shows, but this cannot be the case when the "sale" is from a parent to a subsidiary it lawfully controls. The *Fortner* case and the other tie-in cases all involve sales to independent entities. This is no mere happen-

stance. "[T]he essence of illegality in tying agreements is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next." *Times-Picayune Publishing Co.* v. *United States*, 345 U.S. 594, 611 (1953). Here Toolco used no market power in either jets or financing to compel TWA to take the other "tied" product. Instead, Toolco exercised its "power" as a parent corporation to control the decisions of its subsidiary with regard to both jets and financing.[35] As two commentators correctly assert, "the whole theory of antitrust limitations on [tie-in sales] appears to break down when applied to transactions within a multi-corporate enterprise.*** [W]ithin a corporate system, it is of course always open to a parent company to 'force' a wholly-owned subsidiary to accept particular products by the exercise of central corporate control." Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. Rev. 20, 51 (1968). The only difference with a subsidiary that is less than wholly-owned is the fiduciary duty the parent owes to the minority stockholders of the subsidiary, but that does not alter the antitrust consequences.

The suggestion by the Court of Appeals that antitrust liability might be found on an "exclusive dealing" theory (449 F.2d at 69, App. A-2770), in addition to overlooking that here there was no exclusive dealing, also ignores the fact that TWA was Toolco's lawful subsidiary. The "exclusive dealing" label has no place in parent-subsidiary dealings, because, as the Court recognized in *United States* v.

[35] The weakness of the tying allegation is shown by the statement below that adequate financing was tied to the sale of jets "and vice versa." In a tying arrangement, the purchaser is forced to buy an unwanted product (the "tied" product) in order to obtain the desired "tying" product. An allegation that "A was tied to B and vice versa" makes no antitrust sense, for the same product cannot be both the desired tying product and the unwanted tied product to a single buyer.

Columbia Steel Co., 334 U.S. 495, 523 (1948), a parent may compel its subsidiary to deal only with the parent. In *Standard Oil Company of California* v. *United States*, 337 U.S. 293 (1949), cited by the Court of Appeals,[36] the antitrust illegality consisted of a compulsion upon independent dealers to deal exclusively in defendant's products. All members of the Court agreed that there would be no antitrust violation if the defendant had sold its products through subsidiary stations rather than independent dealers. Indeed Justice Douglas dissented in the *Standard Oil* case because he thought that the effect of the decision would be to encourage oil companies to buy out independent gas stations. 337 U.S. at 315-321.

The vice of an exclusive dealing contract is that it binds an independent businessman to the will of another, thus eliminating competition for the patronage of the former. *Standard Oil Company of California* v. *United States*, *supra*, at 313-314; *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 327 (1961). Exclusive dealing between parent and subsidiary is not anticompetitive; it is the normal way of doing business. The Second Circuit's "exclusive dealing" hypothesis, like its theories of "boycott" and "tying," provides no support whatever for characterizing losses allegedly suffered by TWA as the result of Sherman or Clayton Act violations. In each instance, the Court of Appeals failed to perceive the significance of Toolco's lawful ownership of TWA.

United States v. *Yellow Cab Co.*, 332 U.S. 218 (1947), teaches nothing to the contrary. That case upheld the suffi-

[36] The other case cited by the Court of Appeals for this point, *International Salt Co.* v. *United States*, 332 U.S. 392 (1947), was a tying case in which the sale was to independent enterprises.

ciency of a complaint charging that subsidiary cab operating companies were required to buy cabs from their manufacturer parent.[37] The complaint alleged that restraint of interstate trade "was the primary object of the combination" by which the parent acquired the operating companies, 332 U.S. at 227, and this Court ruled that "any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed." *Ibid.*[38] At the next term the Court read *Yellow Cab* to hold that parent-subsidiary dealings can be unlawful if the acquisition of the subsidiary was unlawful but not if the acquisition was lawful. *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 520-522 (1948). It emphasized that *Yellow Cab* did not mean that all exclusive dealing arrangements are illegal nor does the fact that a subsidiary deals only with its parent for goods make the acquisition of the subsidiary invalid. 334 U.S. at 523. See Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. Rev. 20, 38-41 (1968). In the present case the acquisition of control over TWA was not unlawful, having been approved by the CAB and immunized from antitrust attack. Thus the essential premise of *Yellow Cab* is not present here.

---

[37] *Yellow Cab* is also not in point here because Toolco was not a manufacturer or supplier of commercial aircraft. See pp. 100-103, *infra*. *Yellow Cab* would have been differently decided if the parent had been supplying its operating subsidiaries with Fords or Chevrolets that the subsidiary wanted rather than with cabs manufactured by the parent.

[38] Subsequently this Court affirmed a judgment for defendants based on findings that the acquisition of the operating companies had not been illegal. *United States* v. *Yellow Cab Co.*, 80 F.Supp. 936 (N.D.Ill. 1948), *affirmed*, 338 U.S. 338 (1949).

The Court of Appeals erred in holding that it is a violation of the antitrust laws for a parent to make decisions for or provide goods and services to its lawfully-acquired subsidiary.

B. Lack of Competition with Manufacturers and Suppliers

In the preceding portion of the Argument we have examined the "boycott," "tie-in," and "exclusive dealing" theories adverted to by the Court of Appeals. That court also suggested that liability might have been found on theories of "unlawful *intent* to monopolize a substantial portion of the commercial aircraft market in restraint of trade," or "unlawful conspiracy to do so," or on "the *Yellow Cab* theory" (449 F.2d at 68, App. A-2770), though how the *Yellow Cab* theory differs from the "exclusive dealing" theory already discussed is not made clear. It is essential to each of these theories that Toolco was in competition with other manufacturers and suppliers for the commercial aircraft market. The record shows conclusively that it was not.[39]

It is true that in the notorious paragraph 3 of the complaint (App. A-2), which is in the section of that document describing the parties, Toolco is described as being engaged, among other things, "in the development, manufacture and acquisition of aircraft and related equipment from the manufacturers thereof in various states and in the sale and lease of such aircraft to air carriers in various other states * * *." This is an allegation of fact, admitted by the default, but it should be noted that it does *not* allege, nor has Toolco admitted, that Toolco has ever been in competition with manufacturers or suppliers of commercial aircraft

[39] The *Yellow Cab* theory also fails because Toolco's acquisition of TWA was lawful. See p. 99, *supra*.

for any portion of that market. To the extent that the allegation is indefinite it must be read in the light of what the record shows (449 F.2d at 63, App. A-2758). The record shows beyond doubt that Toolco was not a manufacturer of commercial aircraft. The record shows beyond doubt that Toolco was not a supplier of aircraft, except in the case of aircraft ordered for its own subsidiary. Paragraph 3 is consistent with both of these facts.

TWA admitted in its brief below that defendants did not manufacture commercial jets during the damage period.[40] This admission was inevitable given the undisputed evidence put forth at the damage hearing.[41] The most that the Court of Appeals could find was "significant movement" toward "actual or potential commercial manufacturer or dealership in airplanes * * *" (449 F.2d at 67, App. A-2767).

Toolco was not a manufacturer of commercial airplanes and it was not an independent supplier. CAB opinions and orders covering Toolco's aeronautical activities prior to

---

[40] Brief for Plaintiff-Appellant Trans World Airlines, Inc. at 94: "[D]efendants did not manufacture and sell a 'Hughes jet' during the damage period * * *." Also see *id.* at 70 (emphasis added): *"If* Toolco had *actually* established itself as an aircraft manufacturer * * *."

[41] In opinions and orders from 1944 through 1950, the impartial Civil Aeronautics Board concluded that Toolco was neither engaged in nor planning the manufacture of airplanes for commercial use (6 C.A.B. at 156, App. A-3302; 9 C.A.B. at 383, App. A-3314; 12 C.A.B. at 198, App. A-3345-3346). Schedules to CAB Form 41 Reports, filed by domestic trunk airlines pursuant to § 407 of the Civil Aeronautics Act of 1938, 52 Stat. 973, now 49 U.S.C. § 1377, show that between 1950 and 1966 none of those airlines purchased or leased a Toolco-made airplane. Finally, Robert W. Rummel, who had been employed by TWA since 1943 in the evaluation of aircraft and in discussions with all major United States and foreign aircraft manufacturers, and who was TWA's chief witness at the damage hearing, did not "recall" Toolco manufacturing airplanes for airlines (App. A-475-476, A-971-972).

1950 reveal not a single sale or lease of an airplane from Toolco to carriers other than TWA.[42] Federally required reports filed by Pan American and all of the domestic trunk airlines show that none of the airlines, other than TWA, acquired a single jet or piston plane from Toolco or Hughes between January 1, 1950, and the filing of the complaint on June 30, 1961.[43] In its post-hearing brief to the Special Master TWA admitted that the 63 jets originally ordered by Toolco in the 1950s "were intended for TWA's use."[44] They were not ordered for resale by Toolco as a supplier to air carriers generally.[45] Subsequent reduction in TWA's anticipated needs forced Toolco to re-

---

[42] See note 41, p. 101, *supra*.

[43] *Ibid.* TWA conceded that the summaries of Form 41 reports "were appropriate for judicial notice" and the Special Master admitted them (App. A-1966 Brownell Report 40-41). There is no reason to doubt the veracity and completeness of these summaries or the reports they reflect.

[44] See Memorandum in Support of TWA's Claims for Damages, May 31, 1968, at 4 (Doc. 556-14).

[45] The planes were to be built to satisfy TWA's special requirements, including its unique cockpit configuration (App. A-508-509). Had Toolco intended to sell those jets to other airlines it would have used the specifications of those airlines. No true independent supplier would intentionally deflate the resale value of his product by making further costs, *e.g.*, for modification and pilot retraining, inevitable.

The purchase agreements between Toolco and the manufacturers specifically barred Toolco from assigning its contract rights to any air carrier other than TWA without the written consent of the particular manufacturer (App. AX-63m; AX-1461). Had Toolco intended to supply the 63 planes to carriers other than TWA, it would not have bargained away its freedom to assign, sell, and lease at will.

Toolco delivered all jets immediately or almost immediately to TWA. Every jet delivered in 1959 was delivered immediately to TWA under interim lease (App. AX-893). Every jet delivered in 1960, save for two 331s on which there was a short delay pending completion of financing, was delivered immediately to TWA either under interim lease or by assignment (TWA Schedule B-7 to CAB Form 41, 6/30/60, TWA Ex. 58, DX 358D). On May 9, 1960, Toolco assigned to TWA all the jets still undelivered (except the 16

lease its rights to some of the jets then on order.[46] The manufacturers, not Toolco, later sold or leased those jets to other airlines.[47]

Since Toolco was not a manufacturer or independent supplier, but only a manager and supply conduit for its subsidiary, the Sherman Act charges must fail. A firm that does not even participate in a market can hardly be said to monopolize that market. This principle follows *a fortiori* from *United States* v. *United States Steel Corp.*, 251 U.S. 417 (1920) (40% of an industry not a monopoly), and *United States* v. *Aluminum Co. of America*, 148 F.2d 416 (2d Cir. 1945) (33% not a monopoly). Neither can a nonparticipant be said to have achieved a "dangerous probability" of successfully monopolizing a market when it has not even entered the market. Yet "dangerous probability" is an essential element of every unlawful "attempt to monopolize." *Swift & Co.* v. *United States*, 196 U.S. 375, 396 (1905); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 785 (1946); *Hiland Dairy, Inc.* v. *Kroger Co.*,

---

by which TWA's proposed fleet had been cut back) and confirmed TWA's exclusive right to acquire the jets remaining under lease, contingent on the consummation of financing by June 30 (App. AX-64).

The above facts reveal what was meant by the allegation that Toolco was engaged "in the sale or lease of such aircraft to air carriers" and how improper it would be to read that allegation as stating that Toolco was functioning as an independent supplier to airlines generally.

[46] With the assent of TWA's president, ratification by TWA's Board of Directors, and agreement by Boeing, Toolco offered its rights to six Boeing 331s to Pan American (App. AX-1408; AX-1661-1663).

[47] Boeing, not Toolco, sold the 331s to Pan American (AX-1661-1663). Toolco *released* its rights to six unneeded Convairs, and *Convair itself* leased the planes to Northeast (A-949). Ultimately four other Convairs were delivered to Toolco and duly offered to TWA, but refused by the new management (App. AX-1538-1540). Those four remained unused by any airline for several years (App. A-861-863; AX-10-11).

402 F.2d 968, 974 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969); *Bushie* v. *Stenocord Corp.*, 1972 Trade Cases ¶ 73,896 at p. 91,720 (9th Cir., March 15, 1972); *Keco Industries, Inc.* v. *Borg Warner Corp.*, 334 F. Supp. 1240, 1245 (M.D. Pa. 1971).

The only "market" in which Toolco was a supplier was the TWA market and Toolco could sell or lease planes to TWA only with the approval of the CAB. Toolco's purchase of planes for TWA had no adverse effect on any manufacturer or independent supplier and was lawful, as we have developed above, because of Toolco's control of TWA. This was not a restraint of trade at all, much less an unreasonable restraint as the Sherman Act requires. *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 522 n. 19 (1948); *Standard Oil Company of New Jersey* v. *United States*, 221 U.S. 1, 63-64 (1911).

The fact that the defendants were not in the market of manufacturing or supplying aircraft also undercuts the theory of a conspiracy to monopolize. "A conspiracy to monopolize is a conspiracy to get control of the industry in which the defendant is engaged * * *." *United States* v. *National Retail Lumber Dealers Assn.*, 40 F. Supp. 448, 456 (D. Colo. 1941). This Court has never sustained such a far-fetched proposition as liability for "conspiracy to monopolize" an unentered business. The purported monopolization conspirators with which this Court has dealt have been present participants in the targeted market.

The conspiracy charge also fails for want of the needed kinds of conspirators. The complaint alleges that Toolco conspired with Hughes, said to be "an officer and the sole stockholder of Toolco," Holliday, said to be "the chief

operating officer of Toolco in charge of TWA affairs," and Atlas. A corporation can act only through its officers and agents and, as a matter of law, cannot be held to have conspired with them. *Chapman* v. *Rudd Paint & Varnish Co.*, 409 F.2d 635, 643 n. 9 (9th Cir. 1969); *Nelson Radio and Supply Co., Inc.* v. *Motorola, Inc.*, 200 F.2d 911, 914 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953); *Johnny Maddox Motor Co.* v. *Ford Motor Co.*, 202 F. Supp. 103, 105 (W.D. Tex. 1960). This is one of those rare propositions in antitrust law of which it can be said that "the law appears clear * * *." Willis & Pitofsky, *Antitrust Consequences of Using Corporate Subsidiaries*, 43 N.Y.U.L. Rev. 20, 24 n. 15 (1968). The rule is not changed by the fact that Hughes was the sole stockholder of Toolco as well as an officer. *Goldlawr, Inc.* v. *Shubert*, 276 F.2d 614, 617 (3d Cir. 1960). This proposition disposes of the claim of a conspiracy with Hughes and Holliday.

The Court of Appeals properly saw fit to ignore the claim in the complaint that Atlas, not named as a defendant, was a coconspirator (449 F.2d at 69, App. A-2771). Atlas was neither a manufacturer nor a supplier of commercial aircraft. Its only alleged act was its decision in 1960, 21 years after Toolco, Hughes, and Holliday are said to have begun their conspiracy, to cause Northeast Airlines, which Atlas controlled, to submit a merger proposal to TWA (App. A-14). The merger was not consummated, nor could it have been without CAB approval, upon which the merger was expressly conditioned and through which antitrust immunity would have resulted. This assertion of a conspiratorial involvement by Atlas has such little relation to TWA's damages that had Atlas been named as a defendant it would have been entitled to dismissal. *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253 (1968). Nor

did the Court of Appeals rely on TWA's suggestion in its brief below that TWA might itself have been found to be a reluctant conspirator. It is a sufficient answer to that suggestion that no claim of this kind was ever made in the complaint. *Albrecht* v. *Herald Co.*, 390 U.S. 145, 150 n. 6 (1968).

It was absolutely essential to TWA's Sherman Act charges that Toolco be a competitor of manufacturers and suppliers of commercial aircraft. It could have been found to be such only by that "blind" court, against which Chief Justice Taft admonished in a famous passage, that does not see what "all others can see and understand * * *." *Bailey* v. *Drexel Furniture Co.*, 259 U.S. 20, 37 (1922); *cf. United States* v. *Rumely*, 345 U.S. 41, 44 (1953). The Court of Appeals was not blind, and refused to rely upon any actual competition. But the Court of Appeals undertook to cure this fatal flaw in TWA's case by inventing a new concept of *possible* "independent competitive significance" based on a theory of *potential* entry into the market.[48] In doing so the court below read into the Sherman Act a test appro-

[48] This novel concept is discussed at a number of places in the Second Circuit's opinion. The following passage is illustrative:

> Moreover the documents * * * while * * * showing that Toolco was not a major force as a supplier of aircraft other than to TWA, hardly negative the *possibility that Toolco possessed independent economic significance*, apart from its role as supplier to TWA * * *. There is evidence * * * that suggest[s] *significant movement* by Toolco and Hughes *toward* actual or *potential commercial manufacturer or dealership* in airplanes * * *. We cannot say that proof at a trial * * * that Toolco was more than a conduit for TWA but rather possessed *independent competitive significance* with respect to the commercial aircraft market, would be insufficient, if combined with appropriate related proof of the intent, attempt, collusion, tying arrangements, boycotts, and monopolization alleged in the complaint, to support an antitrust judgment for TWA. [449 F.2d at 67, App. A-2767; emphasis added.]

priate under § 7 of the Clayton Act and, in the process, misapplied the test. The decision below well illustrates "the pitfalls which always lurk in so ambiguous a phrase" as "potential competition"[49] and, if affirmed, would cause great confusion in antitrust litigation.

The distinction between the Sherman Act and the Clayton Act in this regard has long been recognized here and by the lower courts. As was said in *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 597 (1957):

> The Clayton Act was intended to supplement the Sherman Act. Its aim was primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil, which may be at or any time after the acquisition, depending upon the circumstances of the particular case.

See also *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 355 (1922); *Ford Motor Co.* v. *United States*, 92 S.Ct. 1142, 1146 n. 4 (1972). The Court has quoted from the legislative history of the 1950 amendments of the Clayton Act to show that that statute is based on "the concept of reasonable probability" since it "seeks to arrest restraints of trade in their incipiency and before they develop into full-fledged restraints violative of the Sherman Act." *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 323 n. 39 (1962).

"The Sherman Act operates 'after the fact,' that is, once monopolistic proportions have been obtained." *United States* v. *General Dynamics Corp.*, 258 F. Supp. 36, 60 (S.D.N.Y. 1966). It deals, as Senator Kefauver told the Senate in 1950, with "accomplished monopoly." 98 Cong. Rec. 16453

---

[49] Rahl, *Applicability of the Clayton Act to Potential Competition*, 12 Proceedings of ABA Section of Antitrust Law 128, 143 (1958).

(1950). Potential competition is a relevant consideration in § 7 cases. It is not, in the sense that it was used below, in Sherman Act cases.[50]

In *Hiland Dairy, Inc.* v. *Kroger Co.*, 402 F.2d 968 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969), the plaintiff attempted to make an antitrust case out of a food retailer's construction of a dairy facility. The Eighth Circuit approved a dismissal on the pleadings. Allegations of an intent to monopolize plus an initial step supposedly in that direction—building a dairy plant—were insufficient to state a claim. The alleged development toward monopolization was in too infant a stage for a Sherman Act attack.

> [A]bout all anyone could say is that Kroger would have the power potentially to engage in some unfair and predatory practices in this field, but there is no showing of unfair or predatory practices. And any future operations are subject to the proscription of federal and state laws that condemn monopolies and unfair and predatory trade practices that unduly restrict competition. [402 F.2d at 975.]

---

[50] A few Sherman Act decisions have mentioned "potential competition" or similar phrases. *E.g.*, *Standard Oil Company of New Jersey* v. *United States*, 221 U.S. 1, 73-74 (1911); *Associated Press* v. *United States*, 326 U.S. 1, 14 (1945); *American Tobacco Co.* v. *United States*, 328 U.S. 781, 785 (1946); *United States* v. *Columbia Steel Co.*, 334 U.S. 495, 528-529 (1948). But "no [Sherman Act] case seems yet to have turned solely on considerations affecting potential competition * * *." O'Brien, *Potential Competition Under the Sherman Act Cases*, 12 Proceedings of ABA Section of Antitrust Law 105, 107 (1958). The cases that note the concept are inapposite here. They refer to the power of one who has a monopoly to exclude potential entrants, or to the elimination of competition *inter se* among the members of an enterprise. Toolco was not a monopolist since it had not entered the market and it certainly excluded no one. There is no suggestion that Toolco and TWA were potential competitors with each other. If the Sherman Act cases say anything on this point, they state a policy *encouraging* potential entry. The approach of the Court of Appeals is at odds with that policy.

See also *GAF Corp.* v. *Circle Floor Co.*, 329 F. Supp. 823, 828 (S.D.N.Y. 1971), where defendants in a Sherman Act case were granted summary judgment because any steps the defendant had taken toward monopoly "were too remote from achievement to be actionable * * *." These two cases are illustrative of many soundly reasoned Sherman Act cases in which a different result would be required on the approach taken by the Second Circuit in the present case.

In essence, the Court of Appeals thought that Toolco's purchasing decisions for TWA violated the Sherman Act because those decisions were accompanied by a sequence of incipient possibilities: (1) Toolco eventually would become a general manufacturer and supplier of commercial aircraft; (2) despite CAB supervision,[51] Toolco would make TWA into a captive customer bound by exclusive dealing arrangements; (3) despite CAB supervision, risks of Justice Department antitrust suits, and inherent limitations on its ability to shoulder losses, Toolco would use its captive TWA market to subsidize predatory competition aimed at obtaining non-TWA customers; and (4) Toolco would drive others from the non-TWA market and raise permanent barriers to reentry.

If such a pyramid of hypothetical events can form the basis for Sherman Act liability, litigation possibilities for

---

[51] When Toolco in 1956 briefly contemplated manufacturing airplanes itself for TWA, the Board, on its own initiative, ordered an investigation to determine whether the proposed change in Toolco's activities in the field of aeronautics would be a transaction subject to Board approval under § 408 of the Federal Aviation Act and, if so, whether it should approve or disapprove. Order E-10360, June 8, 1956 (App. AX-2149). The investigation was terminated when the Board was advised that Toolco had abandoned the proposed manufacturing project. Order E-12604, June 6, 1958.

imaginative, incipiency-minded plaintiffs would seem enormous. "Theoretically, all manufacturers, distributors, merchants, sellers, and buyers could be considered as potential competitors of each other." *United States* v. *Topco Associates, Inc.*, 92 S. Ct. 1126, 1133 (1972). Persons disappointed in their efforts to sell goods to corporate subsidiaries could readily blame their misfortune on alleged parental schemes to restrain trade. A parent arguably possessing the potential to manufacture goods needed by its subsidiaries would run a grave risk of Sherman Act litigation if it attempted to purchase rather than manufacture the goods. Economically beneficial uses of the parent-subsidiary relationship would be deterred.

It has been said that the antitrust laws were "not passed to outlaw diversification," *Federal Trade Commission* v. *Consolidated Foods Corp.*, 380 U.S. 592, 603 (1965) (Stewart, J., concurring), but on the approach taken below they may well have that result. Section 7 of the Clayton Act has an incipiency standard, but it only applies to the acquisition by one corporation of the stock or assets of another. In contrast, the Sherman Act, as viewed below, has an incipiency standard that applies to *all* transactions, including routine internal expansion or diversification of the sort held not actionable in the *Hiland Dairy* case discussed above.[52]

Arrangements having any potential to lead to illegal tying arrangements would become subject to Sherman Act attack. Until now the *actual* use of *existing* leverage power has been a prerequisite to antitrust condemnation. *E.g.*, *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394

[52] See p. 108, *supra*.

U.S. 495, 502-503 (1969); *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 611 (1953). Under the ruling below alleged *intended* use of *potential* leverage power would be sufficient.

Congress should preside over any such drastic changes in antitrust doctrine. For one thing, the Clayton Act already adequately guards against incipient anticompetitive tendencies in acquisitions. Other acts preliminary to the creation of a dangerous probability of monopoly are not proper subjects for immediate antitrust condemnation. If and when the dangerous probability occurs or the restraint is effected, the Sherman Act can intervene to rescue competition before any damage is done. On the doctrine announced below the federal courts will be clogged for years with premature, time-consuming, purely speculative, and totally unnecessary Sherman Act litigation.

The Court of Appeals committed dangerous error when it set out on its own[53] to import a Clayton Act test into a Sherman Act context. It compounded the error when it misapplied the Clayton Act test by speculating about mere possibilities rather than calculating reasonable probabilities.[54]

The concept of reasonable probability is at the heart of the Clayton Act decisions from which the Second Circuit

---

[53] TWA's complaint makes no reference to potential competition nor was the concept ever mentioned by the Special Master or the District Court. Hence, the Court of Appeals' solo excursion was not anticipated by the parties nor discussed in the briefs below.

[54] The court speaks twice of "the possibility" that Toolco possessed independent economic significance (449 F.2d at 67, 68, App. A-2767, A-2770) and once of "movement by Toolco and Hughes toward * * * potential commercial manufacture or dealership" (449 F.2d at 67, App. A-2767).

apparently borrowed its ideas of potential entry and independent competitive significance. Congress made explicit its intent that courts be concerned with probabilities and not possibilities[55] and this Court has repeatedly acknowledged that "proof of a mere *possibility* of a prohibited restraint or tendency to monopoly will not establish the statutory requirement * * *." *United States* v. *E. I. du Pont de Nemours & Co.*, 353 U.S. 586, 598 (1957). See also *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 356-357 (1922). The Court enforces the "statutory requirement of reasonable probability." *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 175 (1964). See also *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 323 (1962); *Ford Motor Co.* v. *United States*, 92 S.Ct. 1142, 1146 n. 4 (1972).

The Court of Appeals mentions a number of factors to establish the possibility of eventual entry by Toolco into the business of manufacturing airplanes or supplying airplanes for customers other than its subsidiary, TWA. These factors are clearly insufficient to support a finding of reasonable probability.

1. *Potential Manufacturer.* The Court of Appeals noted that Toolco has manufactured helicopters and aircraft parts for military use since World War II (449 F.2d at 67, App. A-2767). This Court can take judicial notice that helicopters and commercial jets are complex and vastly

---

[55] The use of the words ["may be"] means that the bill, if enacted, would not apply to the mere possibility but only to the reasonable probability of the prescribed [*sic*] effect * * * . [S. Rep. No. 1775, 81st Cong., 2d Sess. 6 (1950).]

See also 92 Cong. Rec. 16499-16501 (1950) (remarks of Sen. Donnell).

different products.[56] An enormous array of technological concepts, both theoretical and applied, relate to commercial jetliners but not to helicopters and military aircraft parts.[57] The Court of Appeals did not even mention such obstacles as manpower, basic equipment, and administrative problems inherent in a changeover from defense-related production to commercial operations.[58]

The Court of Appeals also pointed to Toolco's participation with Lockheed in the early 1940's in developing the first Constellations (449 F.2d at 67, App. A-2768). Toolco's role was that of planner, not manufacturer, and its involvement did not indicate a likely entrance into the manufacture of commercial aircraft. As TWA acknowledged in paragraph 13 of the complaint (App. A-11), major airlines frequently joined manufacturers in development of aircraft to fit their special needs. Toolco, as TWA's parent, was doing just that for its subsidiary[59]

---

[56] This is quite unlike cases in which the products were simple in design, closely related in production technique, and nearly identical in end-use. Compare *United States* v. *Continental Can Co.*, 378 U.S. 441, 464-465 (1964) (glass and metal containers); *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 580 (1967) (detergents and abrasive cleaners).

[57] The production of some component parts hardly implies an ability to produce the total product. *Cf. Allis-Chalmers Mfg. Co.* v. *White Consolidated Industries, Inc.*, 414 F.2d 506, 534 (3d Cir. 1969) (Aldisert, J., dissenting).

[58] Although Boeing had developed and manufactured jet bombers and tankers for the Air Force and Douglas had manufactured hundreds of commercial air transports, it took them years to develop the specifications for a commercial jet and three or four more years to effect delivery.

[59] In 1955 Toolco engaged in similar cooperation with Convair just as Pan American worked with Boeing to develop the 707 (App. A-1201).

(6 C.A.B. at 155, App. A-3300).[60] Other factors were cited by the Court of Appeals,[61] but these too establish, if anything, only an ephemeral possibility of entry into the manufacturing market. As the late Justice Harlan stated, "assumption is no substitute for reasonable probability * * *" *Federal Trade Commission* v. *Procter & Gamble Co.*, 386 U.S. 568, 584 (1967) (concurring opinion).

2. *Potential Non-TWA Supplier.* The record shows scarcely even a possibility that Toolco would have become an independent supplier of aircraft. The Court of Appeals cited the 1944 CAB decision for the proposition that 25 Lockheed Constellations "were intended by Toolco for sale to airlines other than TWA" (449 F.2d at 67, App. A-

---

[60] The Court of Appeals also cited the "plywood flying boat" to illustrate Toolco's commercial airplane manufacturing proclivities. The HK-1 plane was built under government contract for military purposes and, as the CAB found, the plane "was not intended to be used for anything but military purposes, and Toolco has no plans to build others like it" (12 C.A.B. at 198 n. 13, App. A-3346 n. 13).

[61] The AVRO and Caravelle episodes (449 F.2d at 67, App. A-2768-69) support no finding of reasonably probable entry, for in each case steps *toward* manufacture were briefly explored and then abandoned (App. AX-1297; A-1807-1808). Another in the court's list of "aborted forays" (449 F.2d at 68, App. A-2768)—and the phrase accurately describes their inconsequential nature—was TWA's 1956 CAB motion for permission to purchase up to 25 Toolco-made jets, if such were ever manufactured. See note 51, p. 109, *supra*. As paragraph 15 of the complaint recites (App. A-12), that "project" died aborning the middle of that same year, without ever reaching even the blueprint stage. The court below further assumed that certain Pratt & Whitney jet engines ordered by Toolco "could well have been intended for installation in the planned Toolco jets * * *" (449 F.2d at 67, App. A-2768). This pyramiding of assumptions is clear error under the reasonable probability standard.

2768), but the CAB reached the opposite conclusion: "There is no evidence of an intention * * * to engage in any phase of supply for commercial aviation" (6 C.A.B. at 155, App. A-3301).

The Court of Appeals also relied upon "testimony that Toolco ordered seven Convair 880s manufactured to the specifications of Capital Airlines and thirteen Convair 990s built for American Airlines' requirements" (449 F.2d at 68, App. A-2769). As the record makes clear, however, the 880s conformed to Capital's specifications simply because Capital itself had originally ordered them (App. AX-1319-1320; AX-1556). After studying the merits of using the 880s as designed or converting them, TWA ultimately decided not to purchase the planes and none was ever completed. The 990s had been independently ordered by American and it was not planning to buy more from Toolco (App. A-832).[62]

The Court of Appeals also mentioned a section of the Toolco-Convair contract for thirty 880s (449 F.2d at 68, App. A-2769). That section provided for a retroactive reduction in Toolco's unit base price for each of Convair's commercial sales over the initial 40 being purchased by Toolco and Delta Airlines (App. AX-63q). The cited section

---

[62] Moreover, the Convair-Toolco 990 agreement—a TWA exhibit (App. AX-652)—expressly barred Toolco from assigning the contract to anyone other than TWA without Convair's prior written consent. Nor, for a two-year period following commencement of deliveries, could the 990s be resold or leased. TWA ultimately selected Boeing 131 Bs and 331 Bs over Convair's 990s (App. A-861). The 990 program was discontinued and none of the 990s scheduled for TWA was ever completed (App. A-841).

is evidence of Toolco's hard bargaining for TWA's ultimate benefit. When other airlines climbed on the 880 bandwagon, they would have to pay their share of development costs reflected in the initial prices agreed to by Toolco and Delta. Another section of the contract leaves no doubt but that Convair, not Toolco, would be making those over-forty sales to new customers (App. AX-63p).[63]

* * * * *

The record thus shows clearly that Toolco was not a reasonably probable entrant into the business of manufacturing or supplying planes to non-TWA carriers. Nor, absent probable entry, is it reasonably probable that Toolco possessed competitive significance in the commercial aircraft manufacture and supply markets except to the extent that it was a buyer for its subsidiary. In its opinion, the Court of Appeals never mentioned "reasonable probabilities." The reason is clear—the most that could be shown was "possibilities." And possibilities have never before this case been held sufficient to create liability under the Clayton Act, much less the Sherman Act.

We emphasize, however, that even if the Court of Appeals had found a reasonable probability of entry—and it did not—this would have been a test wholly foreign to the Sherman Act under the circumstances of this case. It is not enough under the Sherman Act that the party charged

---

[63] The memo regarding Lockheed Electras (App. A-198) does not show Toolco to be a reasonably probable *non-TWA* supplier of Electras. It merely reflects that a TWA director advised TWA's president to discourage Mr. Hughes from buying Electras for *TWA*. The memo is no support for an inference that Toolco intended to offer Electras to anyone *other than TWA*.

with monopolizing or attempting to monopolize may someday enter the relevant market, whether that entry is termed possible, probable, or virtually a certainty. We see, therefore, just how far afield the Court of Appeals has gone and what a disruptive, confusing, and dangerous element has been introduced into the law of antitrust.

VI. Damages Have Been Awarded Without Requisite Proof That They Were The Result of Antitrust Violations.

When this case was before this Court in 1965, Justice White asked counsel for TWA: "How can you prove how much you have been damaged without showing what you have been damaged from?" Transcript of Argument at 28, *Hughes Tool Co.* v. *Trans World Airlines, Inc.*, 380 U.S. 248 (1965). Seven years of further litigation have failed to provide an answer to that question.

Damages cannot be awarded in an antitrust case merely because plaintiff establishes that the antitrust laws have been violated and shows that he has been injured. He must also establish the requisite causal relation between the violation and the injury. This is as true after a default as it is in a contested case.[64] The Special Master and the District Court erroneously thought that there was no requirement of establishing causation. The Court of Appeals recognized that this was wrong, and that causation must be shown, but was willing to rely on assumptions to substitute for the proof that TWA was unable to present. Thus

[64] If, for example, liability is established for a conspiracy to fix the price of watches, a dealer in watches would not be entitled to damages because the watches did not work.

the findings as to damages are fatally tainted by application of erroneous legal standards.

A. The General Standard of Causation

For purposes of this portion of the Argument, we assume —contrary to what we believe to be true—that liability for some violation of the antitrust laws properly could have been found in Toolco's control of TWA, either because of the default or on some novel antitrust theory. Even on that assumption, TWA was not entitled to a judgment for damages unless the injuries for which it claimed damages were "proximately caused" by the antitrust violations.

Section 4 of the Clayton Act allows recovery of treble damages by "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws * * *." For present purposes we assume that TWA has been injured in its business or property. We assume that Toolco and Holliday did something forbidden in the antitrust laws. It is still essential to recovery that the injury be "by reason of" the law violation.

> The statutory requirement that treble damage suits be based on injuries which occur "by reason of" antitrust violations expressly restricts the right to sue under this section. There must be a causal connection between an antitrust violation and an injury sufficient for the trier of fact to establish that the violation was a "material cause" of or a "substantial factor" in the occurrence of damage. [*Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971).]

Thus in *E. V. Prentice Machinery Co.* v. *Associated Plywood Mills, Inc.*, 252 F.2d 473 (9th Cir.), *cert. denied*, 356

U.S. 951 (1958), defendant admitted that it was liable under the antitrust laws in sending threatening letters to plaintiff's customers. At the trial on the issue of damages plaintiff showed that it had suffered a substantial decline in business immediately after defendant did its wrongful acts. The court found, however, that the decline in business began before the threatening letters were sent out, and that it was caused by customer dissatisfaction with the way plaintiff ran its business. It was held that plaintiff had failed to carry its burden of establishing a causal connection between the wrongful acts and its losses and that plaintiff could not recover any damages.

In *Sunkist Growers, Inc.* v. *Winckler & Smith Citrus Products Co.*, 284 F.2d 1 (9th Cir. 1960), *reversed on other grounds*, 370 U.S. 19 (1962), the court sustained a jury's determination of antitrust liability but held that plaintiff could not recover for its business losses if they resulted from a watered-down product rather than from the antitrust violation. And in *Milwaukee Towne Corp.* v. *Loew's, Inc.*, 190 F.2d 561 (7th Cir. 1951), *cert. denied*, 342 U.S. 909 (1952), the court sustained a finding of conspiracy to exclude the plaintiff from access to first-run movies but reversed an award of damages for a period during which plaintiff's theater, prior to remodeling, was not suitable for playing first-run pictures.

Even a showing of cause-in-fact is not, without more, enough to justify an award of damages. As this Court said very recently in *Hawaii* v. *Standard Oil Co.*, 92 S.Ct. 885, 891 n. 14 (1972):

> The lower courts have been virtually unanimous in concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all

> injuries that might conceivably be traced to an antitrust violation.

Thus a plaintiff must show far more than that its injury was an incidental byproduct of an antitrust violation; it must show that it was a target of the unlawful acts. *E.g.*, *Calderone Enterprises Corp.* v. *United Artists Theatre Circuit, Inc.*, 454 F.2d 1292, 1295-1297 (2d Cir. 1971), *cert. denied*, 40 U.S.L.Wk. 3543 (May 15, 1972); *Billy Baxter, Inc.* v. *Coca-Cola Co.*, 431 F.2d 183, 187 (2d Cir. 1970), *cert. denied*, 401 U.S. 923 (1971); *Nationwide Auto Appraiser Service* v. *Association of Casualty & Surety Companies*, 382 F.2d 925, 928-929 (10th Cir. 1967); *Conference of Studio Unions* v. *Loew's, Inc.*, 193 F.2d 51, 55 (9th Cir. 1951), *cert. denied*, 342 U.S. 919 (1952); *Johnson* v. *Ready Mix Concrete Co.*, 318 F.Supp. 930, 932 (D. Neb. 1970); *Rayco Mfg. Co.* v. *Dunn*, 234 F.Supp. 593, 597 (N.D. Ill. 1964).

On this principle a supplier cannot recover though he has been harmed by a conspiracy directed at his customer. *Volasco Products Co.* v. *Lloyd A. Fry Roofing Co.*, 308 F.2d 383, 395 (6th Cir. 1962), *cert. denied*, 372 U.S. 907 (1963); *Snow Crest Beverages, Inc.* v. *Recipe Foods, Inc.*, 147 F. Supp. 907 (D. Mass. 1956). Consumers cannot recover though a conspiracy raised the price of equipment purchased by utilities with which they deal and led to increased rates. *Commonwealth Edison Co.* v. *Allis-Chalmers Mfg. Co.*, 315 F.2d 564, 566-567 (7th Cir.), *cert. denied*, 375 U.S. 834 (1963). In one interesting case a movie producer had contracted for distribution of his picture and made it a condition of the contract that the distributor would not "block book" the picture. Despite the contract, and in the face of

the antitrust laws, the distributor did block book a group of pictures to television and plaintiff contended that as a result he received $400,000 less than the fair value of the television rights for his picture. The defendant's action was clearly unlawful but plaintiff's antitrust complaint was dismissed on the pleadings. The court held that block booking injures television stations that are compelled to accept motion pictures that they do not want and that it injures other distributors who are deprived of an opportunity to license their pictures to stations that have been forced to take defendant's pictures. The television stations and the other distributors were in the "target area" but any injury to the producer was only incidental and not actionable under the antitrust laws. *Fields Productions, Inc.* v. *United Artists Corp.*, 318 F. Supp. 87 (S.D.N.Y. 1969), *affirmed per curiam*, 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971).

Thus in the present case the burden was on TWA to establish that any injury it suffered was caused by the antitrust violations it claimed and that the injury was the direct result of the violation rather than merely incidental to the alleged efforts of Toolco to suppress "competition among aircraft manufacturers and others in the furnishing of aircraft by sale, lease or other means" (Complaint, ¶49, App. A-23).

B. The Effect of the Default

The general principles applicable to proof of unliquidated damages are equally applicable after a default.

> The admission arising from a demurrer or a default is not an acknowledgment, or to be considered as evidence, of liability for substantial damages; nor

> that any such damages were suffered, or if so that the defendant was responsible for them. [Sutherland, *Damages* § 429 (4th ed. 1916).]

It is still incumbent on plaintiff, even after default, to show that he has suffered more than nominal damages and that his damage was caused by the legal wrong charged in the complaint.

In a default case in which well-pleaded facts in the complaint are sufficient for liability, defendant, by defaulting, admits that plaintiff is entitled to recover "some" damages. *Thorpe* v. *National City Bank of Tampa*, 274 F. 200, 202 (5th Cir. 1921). But an admission that the plaintiff is entitled to "some" damages does not prevent the defendant from showing that the plaintiff is entitled only to nominal damages. In *Potts* v. *Howser*, 267 N.C. 484, 148 S.E.2d 836 (1966), the court summarized the rule:

> It is true that defendant's answer has been stricken, and that plaintiff's cause of action and right to recover at least nominal damages have been established. However, defendant is entitled to a trial on inquiry before a jury on the issue of damages. * * * In the trial of the question of damages, the defaulting defendant has the right to be heard and participate. He may, if he can, reduce the amount of damages to nominal damages. [267 N.C. at 494, 148 S.E.2d at 844.]

The effect of a default is the same that the common law gave following judgment for plaintiff on demurrer to the defendant's plea. *Thomson* v. *Wooster*, 114 U.S. 104, 107 (1885); *Lamphear* v. *Buckingham*, 33 Conn. 237, 250 (1866). It remains open for defendant, even after default, to show that "no damages were caused to the plaintiff by the

matters alleged" and thus that only nominal damages can be recovered. *E.g., Electrolytic Chlorine Co.* v. *Wallace & Tiernan Co.*, 328 Mo. 782, 790, 41 S.W.2d 1049, 1052 (1931); *Hallett Construction Co.* v. *Iowa State Highway Commission*, 261 Iowa 290, 295, 154 N.W.2d 71, 74 (1967); *Maywald Trailer Co.* v. *Perry*, 238 S.W.2d 826, 827 (Tex. Civ. App. 1951).

Even after a defendant in an antitrust case has admitted liability "the plaintiff is required to establish with reasonable probability the existence of some causal connection between the defendant's wrongful act and some loss of anticipated revenue." *E. V. Prentice Machinery Co.* v. *Associated Plywood Mills, Inc.*, 252 F.2d 473, 477 (9th Cir.), *cert. denied*, 356 U.S. 951 (1958). The same rule applies after default.

Modern provisions for the assessment of damages after default are traceable directly to the writ of inquiry at common law. See *Thomson* v. *Wooster*, 114 U.S. 104, 111 (1885), quoting from *Hawkins* v. *Crook*, 2 P. Wms. 556, 24 Eng. Repts. 860 (1729); 3 Blackstone, *Commentaries* *398. A leading early American case on the scope of the hearing on damages at common law is *Havens* v. *Hartford & New Haven R.R. Co.*, 28 Conn. 69 (1859). That was an action for injuries sustained by a railroad passenger, in which a hearing on damages was had after defendant's demurrer was overruled. On appeal counsel for defendant argued that "the case stands on a demurrer just as it would have stood on a default," and counsel for plaintiff did not dispute that proposition. Instead he argued that at the inquest on damages defendant must be deemed to have admitted that his acts caused the plaintiff's injuries. His

argument, which the court rejected, is strikingly similar to that advanced by TWA in the present case.

> It is laid down by all the authorities that a demurrer admits all the allegations of the declaration that are well pleaded. * * * We do not claim that immaterial allegations are admitted. But when we allege that our injury was caused by the defendant's negligent act, the allegation is a material one, and if he demurs he admits its truth. * * * Now we claim that the whole inquiry must be as to *how much* we were injured, and that it is too late to inquire whether the plaintiff [*sic;* defendant?] has done us any injury at all. [28 Conn. at 83-85.]

The court specifically rejected that argument. It held that although a demurrer or default may admit all material, well-pleaded allegations, "material" in this sense means "material to the question to be tried by the court; and that is, whether the plaintiff can sustain his action." 28 Conn. at 80. A default or demurrer, the court held, admits nothing with respect to what damages plaintiff ought to recover.[65] That is the issue for the inquest on damages. Accordingly, at that inquest plaintiff must show, among other things, that any substantial damages he seeks to recover were caused by the acts of the defendant. The court said that "a demurrer or default proves nothing more than" that the

---

[65] "An allegation of damage is not, however, a traversable allegation. * * * It is not admitted by a defendant's failure to answer." *McClelland* v. *Climax Hosiery Mills*, 252 N.Y. 347, 351, 169 N.E. 605, 606-607 (1930). That rule survives today in Civil Rule 8(d). See *Vevelstad* v. *Flynn*, 230 F.2d 695, 703 (9th Cir.), *cert. denied*, 352 U.S. 827 (1956).

act charged was done "and nothing but nominal damages will be given unless there be further proof." 28 Conn. at 94.

> May not the defendants show, on the hearing in damages, notwithstanding the demurrer, that the plaintiff's knee was not hurt at all? or if so, that it was caused by his attempt to assail the conductor, or in his twisting his limb under the seat in order to keep from being ejected from the car, or in springing over the seat to avoid the conductor? If so, and the injury to the knee may be denied and disproved, the manner and degree in which it is claimed to have been done by the defendants may be disproved; for the greater includes the less, and the proof of the manner may well show, as it did in this case, that the plaintiff himself was the author of this particular injury. [28 Conn. at 96.]

A multitude of cases support the same proposition.[66] Two are worthy of particular comment. *Dehoff* v. *Black*, 206 N.C. 687, 175 S.E. 179 (1934), was a suit to recover the value of plaintiff's truck, which, plaintiff alleged, was demolished in a collision caused by defendant's negligence. A default judgment was entered after defendant failed to answer. At the inquiry on damages substantial damages were awarded to plaintiff. The Supreme Court of North Carolina held that at the inquiry evidence to show that the driver of the defendant's truck was not the defendant's servant was properly excluded because it "goes only to the

---

[66] *E.g. Went* v. *Schmidt*, 117 Conn. 257, 167 A. 721 (1933); *Graves* v. *Cameron*, 161 N.C. 549, 77 S.E. 841 (1913); *Blow* v. *Joyner*, 156 N.C. 140, 72 S.E. 319 (1911); *Batchelder* v. *Bartholomew*, 44 Conn. 494 (1877); *Barclay* v. *Pickles*, 38 Mo. 143 (1866); *cf. Beall* v. *Munson*, 204 Cal.App.2d 396, 22 Cal. Rptr. 333 (1962); *Sagebiel's, Inc.* v. *Sumrall*, 358 S.W.2d 251 (Tex.Civ.App. 1962).

question of liability." 206 N.C. at 690, 175 S.E. at 181. It reversed, however, because it held that it was error to exclude evidence to show that the collision was caused by the driver of plaintiff's truck.

> A simple illustration may serve to make clear its competency: A and B, each driving a truck or automobile, approach from opposite directions upon the highway. B is slightly over the center of the road. A decides to teach him a lesson by taking his front wheel off. This he does with consequent injury to himself. A sues B and obtains a judgment by default and inquiry for want of an answer. Upon the execution of the inquiry, B offers to show how the collision occurred, not to escape his liability of a penny and the costs established by the judgment, but to show that A's damage, over and above the amount fixed by the default judgment, was the result of a self-inflicted injury (not contributory negligence) and the proper measure of damages. * * * In a tort action for unliquidated damages, the amount recoverable is the sum necessary to compensate the plaintiff for the injury sustained as a proximate result of defendant's negligence or wrong. [206 N.C. at 690, 175 S.E. at 181.]

The other case worthy of note is *McClelland* v. *Climax Hosiery Mills*, 252 N.Y. 347, 169 N.E. 605 (1930), which involved a default judgment in a suit for breach of an employment contract. At a proceeding for an assessment of damages under what was then § 490 of the New York Civil Practice Act,[67] defendant introduced testimony to show that

---

[67] Civil Rule 55(b)(2) was modeled in part on § 490 of the New York Civil Practice Act. 6 Moore, *Federal Practice* ¶55.01[4], at 1804 (2d ed. 1953).

plaintiff had been offered a similar position at the same salary by another employer. On the basis of this testimony the trial court refused to award damages for the remaining period of the contract. The Court of Appeals found that the testimony in the case before it was too uncertain to establish that plaintiff could have had similar employment for any definite time at any definite salary, but it held that testimony of this kind is competent, not to defeat plaintiff's cause of action but "for the purpose of assisting the court in fixing the real damages suffered by the plaintiff." 252 N.Y. at 351, 169 N.E. at 607. In a concurring opinion, joined in by all of the members of the court save one, Chief Judge Cardozo explained that if the employee refuses suitable substitute employment, "he has broken the chain of causation, and loss resulting to him thereafter is suffered through his own act. It is not damage that has been caused by the wrongful act of the employer." 252 N.Y. at 359, 169 N.E. at 609-610.

The *McClelland* case supports the others discussed in this section for the proposition that the defaulted defendant is entitled at the hearing on damages to attempt to show that plaintiff's damage was not caused by the acts alleged. No matter how "well-pleaded" plaintiff's allegations, causation is an issue at the hearing on damages and is not established by the default. The Special Master and the courts below strayed from these simple, sensible, and time-honored principles. In so doing, they plunged the damage hearing into a never-never land where outlandish assumptions substituted for proof of actual facts.

C. Application to the Present Case

Special Master Rankin ruled that in a suit for unliquidated damages, "there is no admission as to the damages by reason of the default, and proof thereof is required" (App. A-366). It was his view that he would have to be "satisfied by a preponderance of the evidence that any damages were proximately caused by the violations of law alleged in the complaint" (App. A-372). He was right, as the discussion in the preceding section has shown.

Unfortunately Special Master Brownell took a different view. He ruled that proximate cause is admitted by the default (App. A-1966 Brownell Report 36) and that after default plaintiff did not have any burden of introducing evidence to prove proximate cause (App. A-1966 Brownell Report 47). The District Court took a similar view (308 F. Supp. at 684-685, 689, App. A-2033-34, A-2042). The Court of Appeals recognized that the opinions below and the briefs of the parties "reveal some confusion as to the proper scope of the hearing on damages" (449 F.2d at 69, App. A-2772), but it did very little in its own opinion to dispel that confusion.

On the one hand, the Court of Appeals stated that "the outer bounds of the recovery allowable are of course measured by the principle of proximate cause" and that "in this sense it was TWA's burden to show 'proximate cause'" (449 F.2d at 70, App. A-2773). Again it said that it is "necessary to establish the causal nexus for the recovery of damages * * *" (449 F.2d at 70, App. A-2774). And it noted that TWA's strategy at the damage hearing "was in fact designed to prove causation" (449 F.2d at 71, App. A-2775).

On the other hand, the Court of Appeals ruled that the default had the effect of admitting that the acts pleaded "caused injury to TWA in the respects there alleged" and that "there was no burden on TWA * * * to show that those acts caused the well-pleaded injuries * * *" (449 F.2d at 70, App. A-2772-2773). It praised Special Master Brownell for his understanding of the law on this point and his application of proper principles (449 F.2d at 70, App. A-2774). On critical issues related to causation, it was willing to rely on what it recognized to be "assumption" only (449 F.2d at 73, 74, App. A-2781).

Neither Special Master Brownell nor the Court of Appeals attempted to explain the connection between the restraints of competition alleged and the managerial decisions that TWA claimed injured it. There was no connection. This is not a situation where unwanted goods were foisted on a captive market or where a manufacturer of aircraft was precluded from supplying the TWA market. The target of the antitrust violations alleged was the suppliers of commercial aircraft and not TWA. Toolco owned 78% of TWA and bore 78% of the alleged losses from its exercise of managerial control.

Because the findings below about damages derived from the application of an improper legal standard to the facts, they cannot stand. *United States* v. *Singer Mfg. Co.*, 374 U.S. 174, 194 n. 9 (1963); 9 Wright & Miller, *Federal Practice and Procedure: Civil* 734 n. 7 (1971). In order to demonstrate the seriousness of the errors in this regard, we will examine in some detail how the causation issue was treated in connection with the largest elements of damage—the

loss of profits from an inadequate jet fleet and the use of leases rather than outright sales.

1. *Loss of Profits.* The largest item of damages included in the judgment was $27.6 million ($82.8 when trebled), representing losses in operating profits due to an inadequate jet fleet caused by delays in deliveries of some jets and failure to deliver 16 other jets. These are discussed in Part I of the Special Master's Report (App. A-1966 Brownell Report 44-167) and are referred to as "Part I damages." Our submission here is that if the proper standard had been applied, the amount allowed on this claim would have been zero, since (1) if there had been a loss of profits it would have been wholly unrelated to the alleged suppression of competition among aircraft manufacturers, (2) Toolco did not in fact cause TWA any loss in operating profits, and (3) the finding to the contrary was based on sheer speculation and guesswork.

TWA's financial expert, Edward J. Morehouse of Drexel Harriman Ripley, testified that a May 1955 public offering of TWA common stock was a prerequisite to all of TWA's subsequent debt financings to pay for the earlier deliveries of the larger reconstructed jet fleet that the damage award assumes an independent TWA would have had. Yet the Special Master found that an independent and prudent TWA, operating free of any restraints or controls by Toolco, would not have made this public offering and that none of the subsequent TWA financings, which would have been necessary to pay for the reconstructed jet fleet, would have taken place (App. A-1966 Brownell Report 256-264).

The testimony of TWA's engineering expert, Rummel, who purported to show that TWA's jet fleet was inadequate,

referred only to what "TWA *should* in fact have ordered" (449 F.2d at 73, App. A-2780; emphasis by the Court of Appeals). Rummel expressly disclaimed any knowledge of TWA's financial capabilities. Nor did he say what an independent and prudent TWA board *would* have ordered.

That is all that TWA proved. TWA did not show that Toolco's acts caused TWA's inadequate jet fleet. As the Special Master found, TWA's own independent and prudent Board of Directors—uninfluenced by Toolco—would not have taken the action necessary to finance the larger jet fleet. Thus TWA's failure to have that fleet was not the result of the assumed violations of the antitrust laws by Toolco.

The Special Master unequivocally rejected TWA's proof that it would have obtained the necessary financing. Unfortunately he did not relate his finding on that point to his analysis of Part I damages. The sum total of his explanation why the causation issue had been satisfied is as follows:

> Given the well-pleaded allegations of the complaint, however, the testimony of Rummel, * * * as well as the Connolly testimony, and the evidence that the assumed additional fleets of B-331s, B-131s and CV-880s were in fact ordered in the same type and quantity by a Hughes-dominated TWA, although at later dates, I am of the opinion that the hypothetical jet fleet and reconstructed delivery dates constitute a proper basis for computing damages under this Section I. [App. A-1966 Brownell Report 56.]

The Special Master thus relied in part on "the well-pleaded allegations of the complaint." The allegations to which he referred were set forth in his report as follows:

> "During this period [in or about October 1955] when other United States-flag air carriers were placing orders for jet powered aircraft, and thereafter, the defendants caused and directed TWA to forego making any arrangements for the acquisition, by sale, lease or otherwise of any jet powered aircraft (par. 17) * * * TWA has further been injured in the following manner:
>
> (a) TWA was prevented from obtaining jet powered aircraft and was deprived of opportunity for adequate use of jet powered aircraft during the years 1958, 1959, 1960 and to date with a resultant loss in profits." (par. 52) [App. A-1966 Brownell Report 45; brackets and asterisks in original.]

These "well-pleaded allegations" are barren of any facts showing that the damages are "the certain result of the wrong." *Story Parchment Co.* v. *Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931). There is only a five-word conclusory statement that there was "a resultant loss of profits." Nowhere in the complaint is it alleged that an independent TWA wanted or would or could have acquired 33 Boeings and 30 Convairs. Nowhere is it alleged that an independent TWA would or could have financed a 63-jet fleet at earlier dates, rather than the historical 47-jet fleet. Nowhere is it alleged that, but for Toolco's oppression, TWA would have obtained equity financing at a much earlier time than actually happened. No facts were alleged to show that plaintiff's harm necessarily was caused by defendant's assumed unlawful conduct. While we can assume that a conclusory allegation that a defendant's con-

duct "result[ed] [in] loss of profits" was sufficient to sustain the complaint against a motion to dismiss filed shortly after the commencement of the action, it does not follow that the same conclusory allegations can be given controlling weight after a two-year hearing on damages.

The Court of Appeals recognized this when it noted that TWA was required to introduce evidence "to establish a causal nexus for the recovery of damages" (449 F.2d at 70, App. A-2774). Since TWA did not allege that it would have ordered and financed a larger jet fleet in time to take earlier deliveries thereof, TWA should have shown that fact in the damage hearing. The "well-pleaded allegations of the complaint" did not establish causation for the specific grounds of damages for which evidence was offered.[68]

---

[68] The following hypothetical cases illustrate the point:

Hypothetical Case #1: X sues Y for the wrongful death of X's deceased. X alleges in his complaint that (a) deceased fell overboard from Y's boat; (b) Y failed to have lifebuoys on board, and (c) as a result, deceased drowned. The trier of facts finds Y was negligent in failing to have lifebuoys on board. What is the judgment? Before answering, consider:

Hypothetical Case #2: X sues Y for the wrongful death of X's deceased. X alleges in his complaint that (a) deceased fell overboard from Y's boat; (b) Y failed to have lifebuoys on board; (c) deceased floundered alongside the boat for five minutes while the deceased's wife looked on in horror; (d) as a result, deceased drowned. The trier of facts finds Y was negligent in failing to have lifebuoys on board. What is the judgment? Is it the same as in Case #1?

It should be obvious that in Case #2 deceased's death is probably caused by Y's failure to have lifebuoys on board. But for the absence of lifebuoys, the deceased would probably have been saved. Judgment for X in Case #2. But can the same be said in Case #1? It is a matter of "speculation or guesswork," *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946), whether the deceased's death was caused by Y's negligence in failing to have lifebuoys on board. Suppose, for example, the deceased did not know how to swim and

Indeed, the Special Master appeared to acknowledge this when he explicitly relied upon the testimony of Rummel and Connelly in concluding that damages were shown.

The Special Master cited "the testimony of Rummel" as one of the main reasons why the causation requirement had been satisfied. Estimates for the "reconstructed" delivery dates for all 63 aircraft were prepared by this TWA Vice President, "TWA's most important witness" (449 F.2d at 71, App. A-2775). The Special Master found him qualified as an expert in "negotiations with aircraft manufacturers with respect to technical specifications, performance characteristics, provisioning and spare parts, delivery schedules and acceptance tests" (App. A-1966 Brownell Report 47). Whatever Rummel's qualifications as an engineer, he was totally ignorant of TWA's financial capabilities. Indeed at the hearing he repeatedly disclaimed knowledge of TWA's

---

sank without a trace within seconds after hitting the water? In an earlier Second Circuit case the ruling was for Y:

> [T]here is nothing whatever to show that the decedent was not drowned because he did not know how to swim, nor anything to show that, if there had been a life buoy on board, the decedent's wife would have got it in time, * * * or, if she had, that she would have thrown it so that her husband could have seized it, or * * * that, if he did, it would have prevented him from drowning. [*New York Central R. Co.* v. *Grimstad*, 264 F. 334, 335 (2d Cir. 1920).]

The point of these hypotheticals is that while a complaint may be sufficient to state a cause of action, that fact alone does not necessarily establish cause-in-fact. The leading students of causation accept the result in the *Grimstad* case, just described, and use it to illustrate the proposition that "if the greatest efforts on the part of all concerned would probably not have averted the harm causal connexion is not made out." Hart & Honoré, *Causation in the Law* 371 (1959). It is submitted that TWA's complaint is analogous to Case #1 and, as a consequence, it was necessary for it to prove at the damage hearing that it would not have drowned anyhow.

financial situation during the period when financing would have been needed to support his reconstructed jet fleet. By way of example:

> The Special Master: Do you have an opinion as to whether or not TWA was in a position to finance the acquisition of these planes? Do you have an opinion?
> The Witness [Rummel]: I don't think I have an opinion that's sufficiently valid to present, no. [App. A-503.]

* * * * *

Q. [Toolco counsel]: Did you give financial ability of TWA any weight at all in the preparation of this sentence?
A. [Rummel]: This is an area in which I personally am not especially proficient. It was not my intention to get into that.
Q. Does that mean that you did not give weight to financial ability of TWA?
A. Not particularly. [App. A-547.]

* * * * *

Q. [Toolco counsel]: So does your opinion as expressed in this sentence contain an assumption by you that TWA could have placed the orders for the Convairs in 1956?
A. [Rummel]: Well, I'm simply stating that if TWA had done that what the effect would have been. * * *

> The Special Master: Have you anything to add to it to your knowledge as to whether or not TWA could have placed the order at the same date that Toolco placed it?
> [Toolco counsel]: That's right.
> The Witness: Well, you see that gets over into the area of financing ability and all that sort of thing and I don't feel too competent to testify on it. That was not my area of responsibility. [App. A-626.]

* * * * *

Q. [Toolco counsel]: Is it correct or not, Mr. Rummel, that so far as this particular sentence is concerned, you are indulging the assumption that TWA would have been financially able to place the orders at the time Toolco placed them? * * *

A. [Rummel]: Well, in the reconstruction that's contained in the testimony, it is assumed that TWA would have ordered and then we derived the result that would have been achieved. [App. A-626-627.]

Other examples abound.[69]

The testimony of Rummel makes it very clear that he was not competent to testify on what TWA *could* have done and that he merely assumed what TWA *would* have done. His testimony was an academic answer to an academic question: what *should* TWA have done? The Special Master assumed that TWA could and would have done what Rummel testified it should have done. This assumption follows from the erroneous view that a causal nexus need not be shown, even when it had not been specifically alleged, in the damage hearing.

The erroneous reliance upon the Rummel testimony is analogous to the situation in *Flintkote Co.* v. *Lysfjord*, 246 F.2d 368 (9th Cir.), *cert. denied*, 355 U.S. 835 (1957). Plaintiffs there sought damages for loss of profits that they would have realized if an antitrust violation had not prevented them from acquiring acoustical tile from defendant Flintkote on a direct basis. To prove damages plaintiffs testified that, while they knew nothing of the finances of the business and had never managed such a business

[69] *E.g.*, App. A-492, A-548, A-563, A-664, A-746, A-811, A-813, and A-917.

before, they fully anticipated annual profit increases based on the assumption of " 'just normal expected increase in good will and sales, [and] promotional work.' " 246 F.2d at 390. Neither the plantiffs in *Flintkote* nor Rummel in our case could give even an educated guess as to what *would* have happened absent defendants' unlawful conduct. The Ninth Circuit's answer in *Flintkote*, made with a full appreciation of the relaxed standard of proof of damages in antitrust cases, is equally applicable here:

> What, then, were plaintiffs' estimates and upon what factual basis were they grounded? In essence, the computation of lost profits was based on the *assumption* that the plaintiffs would make as much working for themselves in their first year of operation as they and their employer, R. W. Downer Co., made together from their sales in their best year working for that going concern; that thereafter, profits would increase as much as 50% annually. * * *
>
> The foregoing represents the sum and substance of plaintiffs' evidence on this issue. The omissions are manifold and significant. Nowhere in the record is there any substantial evidence of the state of the industry during this three year period. There is no evidence that plaintiffs would probably have obtained more business if they could have purchased Flintkote tile on a direct basis * * *. [246 F.2d at 391; emphasis added.]

This, the court held, was not enough. Proof of damages, even in an antitrust case, requires "something better * * * than a mere interested guess." 246 F.2d at 394. See also *Wolfe* v. *National Lead Co.*, 225 F.2d 427 (9th Cir.), *cert. denied*, 350 U.S. 915 (1955), in which the evidence in an antitrust case was held insufficient to establish any injury

where it rested on the fact that the plaintiffs "*assume* that they would have received larger quantities of titanium except for the alleged conspiracy; *but there is no evidence that they would have* * * *." 225 F.2d at 432 (emphasis added).

The Court of Appeals in the present case recognized that the award was based on assumption. It accepted "the *assumption* that TWA would have acted approximately as did Toolco * * * " and the "*assumption* that an independent TWA would and could have financed the full 63-jet fleet * * * " (449 F.2d at 73, 74, App. A-2781; emphasis added). But assumption is not proof, as the cases just discussed show.

The Special Master's third reason for finding causation was "the Connelly testimony" (App. A-1966 Brownell Report 56). This point hardly deserves rebuttal—except for its importance to the award—since Mr. J. B. Connelly, who was a *Boeing* Vice President, was obviously in no position to know what the *TWA* Board would have been able to finance. His testimony, like Rummel's, spoke only to what TWA *should* have done and had no probative value on the causation issue.

Finally, the Special Master pointed to the fact that the assumed fleets "were in fact ordered in the same type and quantity by a Hughes-dominated TWA, although at later dates * * *" (App. A-1966 Brownell Report 56). There are three reasons why this adds nothing. (1) A "Hughes-dominated TWA" did not order this fleet at all. The order was placed by Toolco. That Toolco, a wealthy corporation with interests far beyond the airline business, could order a 63-jet fleet is no proof that an independent TWA would

have had the resources to do so. (2) The Toolco order was cut back from 63 jets to 47. No evidence showed, or purported to show, that an independent TWA would have been able to finance more aircraft for itself than a "Hughes-dominated TWA" would have financed. (3) Finally, the Special Master's concession that the same type and quantity were ordered "although at later dates" is precisely the issue here. It is because the assumed 63-jet fleet—as well as the actual 47-jet fleet—would not have been ordered and financed at earlier dates that TWA's "damages" did not result from the alleged illegal conduct of Toolco.

TWA's only evidence of financing capability was the Drexel Harriman Ripley report, designed to provide evidence that financing would have been available for the reconstructed jet fleet. The Ripley firm assumed that an initial jet fleet "would have been ordered by an independent and competent management in the fall of 1955" (App. AX-353), rather than in the period December 1955 to early 1956, as actually happened. From that assumption the firm determined that it was necessary for TWA to have made in May 1955 a public offering of TWA common stock to provide net proceeds of $55.5 million, and thus ensure sufficient equity capitalization to sustain later and more substantial debt financings. The firm found this offering was an absolute prerequisite to all later financings (App. A-1966 Brownell Report 256) and stated that it would have advised the independent TWA board in early 1955 to make such a stock offering.

This evidence was positively and explicitly rejected by the Special Master (App. A-1966 Brownell Report 256-263). He said:

> I conclude that an independent prudent Board of TWA would not have accepted and acted upon the Drexel Harriman Ripley recommendations and that the sale in May 1955 of common stock of TWA for $58.5 million netting TWA $55.5 million would not have occurred.
>
> * * * * *
>
> I conclude that TWA has not proved that either of the 1955 financings could have been reasonably negotiated at the time, in the amount and according to the terms suggested, by an independent and prudent management.
>
> Since the May 1959 equity financing of $60 million and debt financing of $90-100 million assumed and were dependent upon the 1955 common stock and mortgage debt financings and since I have determined that the latter on their face as proposed by TWA's expert could not have taken place under the historical circumstances established in the record, I thus find a failure of proof with regard to these subsequent financings . [App. A-1966 Brownell Report 261, 263.]

Thus the Special Master completely rejected the only evidence presented that an independent TWA could or would have obtained the financing at the earlier times and in the greater amounts required to effect timely delivery of the reconstructed jet fleet.

But these findings of the Special Master in Part III of his report were inexplicably forgotten in Part I. In Part III he heeded and quoted the words of *Bigelow* v. *RKO Radio Pictures, Inc.*, 327 U.S. 251, 265 (1946), that "even where

the defendant by his own wrong has prevented a more precise computation, the [trier of fact] may not render a verdict based on speculation or guesswork" (App. A-1966 Brownell Report 257). But in Part I, in analyzing the acquisition of the reconstructed jet fleet, he said: "I have assumed that funds were available at the time of the delivery of each aircraft" (App. A-1966 Brownell Report 148). This assumed $200 million more than TWA borrowed historically, excluding the massive contributions by Toolco. The only evidence that could have sustained the assumption was actually rejected by the Special Master as too unreal to be accepted.[70]

The only possible explanation for the Special Master's failure to " 'look at the whole picture and not merely at the individual figures in it,' " *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690, 699 (1962), is his mistaken view that plaintiff did not bear "the burden of introducing evidence to prove proximate cause, regardless of the default" (App. A-1966 Brownell Report 47). Thus his findings in Part I are irremediably tainted. Had he focused on the question whether Toolco caused TWA to have an inadequate fleet or whether an independent and prudent TWA board would have had an inadequate fleet anyway, he would undoubtedly have discussed his Part I findings in light of his Part III findings, and recognized TWA's failure

[70] To find that TWA would have made the stock offering in May 1955 "would in my opinion endow Drexel Harriman Ripley and an independent prudent Board of TWA in 1955 with a prescience, wisdom and perfection of timing that exceeds the natural capacity of the most experienced men acting without the benefit of hindsight" (App. 1966 Brownell Report 258).

to establish the causal nexus between Toolco's act and TWA's inadequate jet fleet.[71]

2. *Use of Leases.* The Special Master awarded TWA $5.3 million as damages ($15.9 when trebled) for Toolco's leasing planes to TWA rather than selling them to TWA outright. TWA made no such claim in its complaint. It never alleged, and the default did not admit, the acts for which the award was made.

Although a great deal was said in the complaint about other financing decisions that Toolco made that TWA claimed to be illegal and injurious (Complaint, ¶¶ 23-28, 52(c), (d), App. A-15-16, A-24-25), TWA never alleged that Toolco's 1959 and 1960 managerial decisions to lease airplanes to TWA pending final arrangements for sale con-

---

[71] The Court of Appeals sought to fill this gap by saying that Toolco should not be heard to assert that TWA would not have financed a 63-jet fleet at the earlier dates because it was Toolco's own supposed "crippling TWA's financial posture and reducing it to a state of vassalage, dependent on Toolco's support," all in violation of the antitrust laws, that rendered TWA incapable of doing any better (449 F.2d at 74, App. A-2782). This argument totally ignores the fact that the Special Master and TWA's own financial experts accepted TWA's financial condition as being free of tainted Toolco impact at the very time at the close of 1954 and early 1955 when an independent and prudent TWA board was supposed to have taken necessary action to finance the 63-jet fleet.

> The damages claimed [under Part I] are confined to those said to stem from actions of the defendants in the period from early 1955 to the end of 1960 * * *. [App. A-1966 Brownell Report 45.]
>
> I must consider the actual Balance Sheet as of December 31, 1954 and the actual operating results for the year 1954 and the first two calendar quarters of 1955, as did TWA and its experts Drexel Harriman Ripley, and as must have an independent Board. [App. A-1966 Brownell Report 256.]

The point is further shown by the ten paragraphs of the complaint that the Court of Appeals cited for its "vassalage" statement. Not one of those paragraphs alleges any wrongful act of Toolco prior to 1955.

stituted antitrust violations. Nor did TWA allege that it was injured by the selection of a temporary rental mechanism rather than immediate sale.

The only paragraph of the complaint that offered any particulars regarding the lease arrangements makes it crystal clear that TWA was not complaining about the use of leases rather than sale but about an exclusive dealing arrangement with Toolco that purportedly ran concurrently with the leases. Paragraph 20 of the complaint alleged:

> During the period 1959 to 1960, defendants arranged for the lease to TWA by Toolco of certain jet-powered aircraft on a day-to-day basis. Such aircraft were the first and only jet-powered aircraft made available to TWA by the defendants during the years 1955 to 1960 and the number of aircraft so leased by Toolco to TWA was inadequate for the needs of TWA. Such leases were given on a continuing condition, agreement and understanding that TWA would not purchase or lease aircraft from any other potential supplier thereof. The effect of such continuing condition, agreement and understanding was to foreclose, to all potential suppliers of jet-powered aircraft to TWA other than defendants, the opportunity for *selling or leasing* jet-powered aircraft to TWA. [App. A-13-14; emphasis added.]

The phrase "selling or leasing" is the giveaway. TWA was concerned with *who* its suppliers were, not with the *manner* in which supplies were furnished. It would have had the same complaint about exclusive dealing even if Toolco had sold each jet to TWA as soon as it was available.

The Special Master recognized this. He said that "the singular thrust of the paragraph goes toward the claim that

the 1959-1960 leases did not provide a sufficient number of aircraft for TWA's needs and that the provisions of the lease agreements prohibited TWA from buying *or leasing* other jet aircraft from another potential supplier" (App. A-1966 Brownell Report 180; emphasis in original). But he was not deterred by what he termed "an omission in a specific allegation" (App. A-1966 Brownell Report 181) and thought that the general allegations of paragraphs 9(f) and 10(h) supported his award of damages for lease-related losses. They do not. Paragraph 10 is an allegation of intent, which says that the acts described in subsequent paragraphs were done in furtherance of the offenses charged in the preceding paragraph.[72] The only subsection of "the preceding paragraph" to mention leasing is 9(f). By its own terms, 9(f) is concerned only with the alleged Clayton § 3 offense of exclusive leasing *and selling*, and not with any offense relating to the relative merits of temporary rental vis-a-vis immediate purchase.[73] Nor is there anything

---

[72] Paragraph 10(h) reads in full as follows:

> Each act of the defendants and Atlas hereinafter alleged was done in furtherance of the offenses charged in the preceding paragraph and was a part thereof and was done with the primary purpose of restraining and monopolizing the trade and commerce described above. It was the intent of the defendants and Atlas, *inter alia*:
>
> * * *
>
> (h) That the defendants and Atlas would obtain substantial profits for themselves, at the expense of TWA and other air carriers, as the result of restrictions upon competition in the trade and commerce hereinbefore alleged. [App. A-9-10.]

[73] Paragraph 9(f) reads in full as follows (emphasis added):

> Beginning in or about the year 1939 and continuing up to and including the date of the filing of this complaint, the defend-

whatever in the "injury" portion of the complaint (¶¶ 49-54, App. A-23-27) suggesting that TWA was injured because of Toolco's preference for leasing rather than selling.

By virtue of the default, TWA has the benefit of having the factual allegations of its complaint assumed to be true. At the same time, however, it is confined by the complaint and cannot recover what it did not claim. As this Court has said, a treble damage plaintiff not only must plead acts constituting a violation but must further plead "that plaintiff was damaged thereby." *Radiant Burners, Inc.* v. *Peoples Gas Light & Coke Co.*, 364 U.S. 656, 660 (1961). Failure to allege "at least in general terms, the mode of injury, the nature and extent of loss" traceable to the leasing decision is fatal to TWA's case, even assuming that TWA properly pleaded that decision as an antitrust offense. *Sam S. Goldstein Industries* v. *Botany Industries, Inc.*, 301 F. Supp. 728, 734 (S.D.N.Y. 1969).

In addition, TWA never either pleaded or proved that the decisions to lease rather than purchase proximately caused any injury to it. As explained earlier, TWA failed to prove an essential element of proximate cause, i.e., that an independent TWA board either would or could have purchased the jets instead of renting them. No amount of *ex post facto* arithmetical calculation or recitations of opinions on the general desirability of purchasing as opposed to leasing can rectify plaintiff's failure of proof.

---

ants, Atlas and other persons acting for each of them have been and are now engaged in

* * *

(f) *Sales and leases* of jet-powered aircraft on the condition, agreement and understanding that the purchaser or lessee shall not *buy or lease* the goods of a competitor or competitors of the vendor or lessor, in violation of Section 3 of the Clayton Act; and

* * *. [App. A-8-9.]

CONCLUSION

Because of the vast stakes involved, petitioners have felt obliged to discuss at length the various issues the Court has agreed to review. The comprehensiveness of our discussion may tend to suggest a complexity that the case does not have and give TWA's position a dignity it does not deserve. Stripped of the overtones of contumacy that the lower courts mistakenly thought were present and of the enthusiastic rhetoric with which plaintiff pleaded legal conclusions, the case is really quite simple. The new management of TWA disagrees with some of the decisions Toolco made for TWA during the last six years of Toolco control. Its resort to federal court to litigate these differences of view has been rewarded beyond its fondest dreams—indeed, beyond its prayer for relief—by a huge judgment in its favor though it has never shown, and the courts below have never decided, how Toolco violated the antitrust laws by making decisions, even erroneous decisions, for its subsidiary, or why any antitrust violations that might be found were not within the immunity conferred by CAB approval of Toolco's control of TWA, or what causal relation existed between the supposed antitrust violations and the damages it has been awarded. Toolco stands to lose a great deal if the decision below is affirmed but the federal courts stand to lose even more. The decision below does violence to sound and well-established principles of antitrust law, of the proper relation between the courts and administrative agencies, and of fair and orderly procedure.

For all of the reasons set out in this brief, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

CHARLES ALAN WRIGHT
2500 Red River
Austin, Texas 78705

CLARK M. CLIFFORD
THOMAS D. FINNEY, JR.
CLIFFORD, WARNKE, GLASS,
McILWAIN & FINNEY
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

E. BARRETT PRETTYMAN, JR.
HOGAN & HARTSON
815 Connecticut Avenue, N.W.
Washington, D.C. 20006

CHESTER C. DAVIS
MAXWELL E. COX
DAVIS & COX
120 Broadway
New York, New York 10005

Attorneys for Petitioners

ANNEX

Statutory Provisions Involved

UNITED STATES CONSTITUTION AMENDMENT V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

UNITED STATES CODE, Title 15:

§ 1. [Sherman Act § 1] *Trusts, etc., in restraint of trade illegal; exception of resale price agreements; penalty.* Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal: PROVIDED, That nothing contained in sections 1-7 of this title shall render illegal, contracts or agreements prescribing minimum prices for the resale of a commodity which bears, or the label or container of which bears, the trademark, brand, or name of the producer or distributor of such commodity and which is in free and open competition with commodities of the same general class produced or distributed by others, when contracts or agreements of that description are lawful as applied to intrastate transactions, under any statute, law, or public policy now or hereafter in effect in any State, Territory, or the District

of Columbia in which such resale is to be made, or to which the commodity is to be transported for such resale, and the making of such contracts or agreements shall not be an unfair method of competition under section 45 of this title: PROVIDED FURTHER, That the preceding proviso shall not make lawful any contract or agreement, providing for the establishment or maintenance of minimum resale prices on any commodity herein involved, between manufacturers, or between producers, or between wholesalers, or between brokers, or between factors, or between retailers, or between persons, firms, or corporations in competition with each other. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1-7 of this title to be illegal shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 2. [Sherman Act § 2] *Monopolizing trade a misdemeanor; penalty.* Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding fifty thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.

§ 14. [Clayton Act § 3] *Sale, etc., on agreement not to use goods of competitor.* It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities,

whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

§ 15. [Clayton Act § 4] *Suits by persons injured; amount of recovery.* Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.

§ 18. [Clayton Act § 7] *Acquisition by one corporation of stock of another.* No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such

acquisition may be substantially to lessen competition competition, or to tend to create a monopoly.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this section prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, or the natural and legitimate branches or extensions thereof, or from owning and holding all or a part of the stock of such subsidiary corporations, when the effect of such formation is not to substantially lessen competition.

Nor shall anything herein contained be construed to prohibit any common carrier subject to the laws to regulate commerce from aiding in the construction of branches or short lines so located as to become feeders to the main line of the company so aiding in such construction or from acquiring or owning all or any part of the stock of such branch lines, nor to prevent any such common carirer from acquiring and owning all or any part of the stock of a

branch or short line constructed by an independent company where there is no substantial competition between the company owning the branch line so constructed and the company owning the main line acquiring the property or an interest therein, nor to prevent such common carrier from extending any of its lines through the medium of the acquisition of stock or otherwise of any other common carrier where there is no substantial competition between the company extending its lines and the company whose stock, property, or an interest therein is so acquired.

Nothing contained in this section shall be held to affect or impair any right heretofore legally acquired: PROVIDED, That nothing in this section shall be held or construed to authorize or make lawful anything heretofore prohibited or made illegal by the antitrust laws, nor to exempt any person from the penal provisions thereof or the civil remedies therein provided.

Nothing contained in this section shall apply to transactions duly consummated pursuant to authority given by the Civil Aeronautics Board, Federal Communications Commission, Federal Power Commission, Interstate Commerce Commission, the Securities and Exchange Commission in the exercise of its jurisdiction under section 79j of this title, the United States Maritime Commission, or the Secretary of Agriculture under any statutory provision vesting such power in such Commission, Secretary, or Board.

UNITED STATES CODE, Title 49:

§ 1302. [Section 102, Federal Aviation Act] *Declaration of Policy: The Board.*

In the exercise and performance of its powers and duties under this Act, the Board shall [illegible] the following,

among other things, as being in the public interest, and in accordance with the public convenience and necessity:

(a) The encouragement and development of an air-transportation system properly adapted to the present and future needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(b) The regulation of air transportation in such manner as to recognize and preserve the inherent advantages of, assure the highest degree of safety in, and foster sound economic conditions in, such transportation, and to improve the relations between, and coordinate transportation by, air carriers;

(c) The promotion of adequate, economical, and efficient service by air carriers at reasonable charges, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices;

(d) Competition to the extent necessary to assure the sound development of an air-transportation system properly adapted to the needs of the foreign and domestic commerce of the United States, of the Postal Service, and of the national defense;

(e) The promotion of safety in air commerce; and

(f) The promotion, encouragement, and development of civil areonautics.

§ 1378. [Section 408, Federal Aviation Act] *Consolidation, merger, and acquisition of control.*

(a) *Prohibited acts.* It shall be unlawful unless approved by order of the Board as provided in this section—

* * * * *

(5) For any air carrier or person controlling an air carrier, any other common carrier, or any person engaged in any other phase of aeronautics, to acquire control of any air carrier in any manner whatsoever;

* * * * *

(b) *Application to Board; hearing; approval; disposal without hearing.* Any person seeking approval of a consolidation, merger, purchase, lease, operating contract, or acquisition of control, specified in subsection (a) of this section, shall present an application to the Board, and thereupon the Board shall notify the persons involved in the consolidation, merger, purchase, lease, operating contract, or acquisition of control, and other persons known to have a substantial interest in the proceeding, of the time and place of a public hearing. Unless, after such hearing, the Board finds that the consolidation, merger, purchase, lease, operating contract, or acquisition of control will not be consistent with the public interest or that the conditions of this section will not be fulfilled, it shall by order approve such consolidation, merger, purchase, lease, operating contract, or acquisition of control, upon such terms and conditions as it shall find to be just and reasonable and with such modifications as it may prescribe:

* * * * *

(e) *Investigation of violations.* The Board is empowered, upon complaint or upon its own initiative, to investigate and, after notice and hearing, to determine whether any person is violating any provision of subsection (a) of this section. If the Board finds after such hearing that such

person is violating any provision of such subsection, it shall by order require such person to take such action, consistent with the provisions of this chapter, as may be necessary, in the opinion of the Board, to prevent further violation of such provision.

* * * * *

§ 1379. [Section 409, Federal Aviation Act] *Prohibited Interests: Interlocking Relationships.*

(a) It shall be unlawful, unless such relationship shall have been approved by order of the Board upon due showing, in the form and manner prescribed by the Board, that the public interest will not be adversely affected thereby—

(1) For any air carrier to have and retain an officer or director who is an officer, director, or member, or who as a stockholder holds a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(2) For any air carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(3) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest, in any other person who is a common carrier or is engaged in any phase of aeronautics.

(4) For any air carrier to have and retain an officer or director who is an officer, director, or member, or who as a stockholder holds a controlling interest, in any person whose principal business, in purpose or in

fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

(5) For any air carrier, knowingly and willfully, to have and retain an officer or director who has a representative or nominee who represents such officer or director as an officer, director, or member, or as a stockholder holding a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

(6) For any person who is an officer or director of an air carrier to hold the position of officer, director, or member, or to be a stockholder holding a controlling interest, or to have a representative or nominee who represents such person as an officer, director, or member, or as a stockholder holding a controlling interest, in any person whose principal business, in purpose or in fact, is the holding of stock in, or control of, any other person engaged in any phase of aeronautics.

* * * * *

§ 1381. [Section 411, Federal Aviation Act] *Methods of Competition.*

The Board may, upon its own initiative or upon complaint by any air carrier, foreign air carrier, or ticket agent, if it considers that such action by it would be in the interest of the public, investigate and determine whether any air carrier, foreign air carrier, or ticket agent has been or is engaged in unfair or deceptive practices or unfair methods of competition in air transportation or the sale thereof. If the Board shall find, after notice and hearing, that such air carrier, foreign air carrier, or ticket agent is engaged in such unfair or deceptive practices or unfair methods of competition, it shall order such air carrier, foreign air carrier, or ticket agent to cease and desist from such practices or methods of competition.

§ 1384. [Section 414, Federal Aviation Act] *Legal restraints.* Any person affected by any order made under sections 1378, 1379, or 1382 of this title shall be, and is hereby, relieved from the operations of the "antitrust laws", as designated in section 12 of Title 15, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order.

§ 1482. [Section 1002(b), Federal Aviation Act] *Investigations on Initiative of Administrator or Board.*

(b) The Administrator or Board, with respect to matters within their respective jurisdictions, is empowered at any time to institute an investigation, on their own initiatve, in any case and as to any matter or thing within their respective jurisdictions, concerning which complaint is authorized to be made to or before the Administrator or Board by any provision of this Act, or concerning which any question may arise under any of the provisions of this Act, or relating to the enforcement of any of the provisions of this Act. The Administrator or the Board shall have the same power to proceed with any investigation instituted on their own motion as though it had been appealed to by complaint.

§ 1482. [Section 1002(c), Federal Aviation Act] *Entry of Orders for Compliance with Act.*

(c) If the Administrator or the Board finds, after notice and hearing, in any investigation instituted upon complaint or upon their own initiative, with respect to matters within their jurisdiction, that any person has failed to comply with

any provision of this Act or any requirement established pursuant thereto, the Administrator or the Board shall issue an appropriate order to compel such person to comply therewith.

§ 1485. [Section 1005(d), Federal Aviation Act] *Suspension or Modification of Order.*

(d) Except as otherwise provided in this Act, the Administrator or the Board is empowered to suspend or modify their orders upon such notice and in such manner as they shall deem proper.

UNITED STATES CODE, Title 28:

§ 1292. *Interlocutory decisions.*

* * * * *

(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

* * * * *

RULES OF CIVIL PROCEDURE

Rule 16. *Pre-Trial Procedure: Formulating Issues.* In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider

(1) The simplification of the issues;

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The advisability of a preliminary reference of issues to a master for findings to be used as evidence when the trial is to be by jury;

(6) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice. The court in its discretion may establish by rule a pre-trial calendar on which actions may be placed for consideration as above provided and may either confine the calendar to jury actions or to non-jury actions or extend it to all actions.

Rule 37. Refusal To Make Discovery: Consequences.

* * * * *

(b) *Failure to Comply With Order.*

(1) *Contempt.* If a party or other witness refuses to be sworn or refuses to answer any question after being directed to do so by the court in the district in which the deposition is being taken, the refusal may be considered a contempt of that court.

(2) *Other Consequences.* If any party or an officer or managing agent of a party refuses to obey an order

made under subdivision (a) of this rule requiring him to answer designated questions, or an order made under Rule 34 to produce any document or other thing for inspection, copying, or photographing or to permit it to be done, or to permit entry upon land or other property, or an order made under Rule 35 requiring him to submit to a physical or mental examination, the court may make such orders in regard to the refusal as are just, and among others the following:

(i) An order that the matters regarding which the questions were asked, or the character or description of the thing or land, or the contents of the paper, or the physical or mental condition of the party, or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(ii) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing in evidence designated documents or things or items of testimony, or from introducing evidence of physical or mental condition;

(iii) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;

(iv) In lieu of any of the foregoing orders or in addition thereto, an order directing the arrest of any party or agent of a party for disobeying any of such orders except an order to submit to a physical or mental examination.

* * * * *

(d) *Failure of Party To Attend or Serve Answers.* If a party or an officer or managing agent of a party wilfully fails to appear before the officer who is to take his deposi-

tion, after being served with a proper notice, or fails to serve answers to interrogatories submitted under Rule 33, after proper service of such interrogatories, the court on motion and notice may strike out all or any part of any pleading of that party, or dismiss the action or proceeding or any part thereof, or enter a judgment by default against that party.[1]

Rule 54. *Judgment; Costs.*

* * * * *

---

[1] Rule 37 was amended March 30, 1970, effective July 1, 1970. The rule now provides, in pertinent part:

(d) *Failure of Party To Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b) (6) or 31(a) to testify on behalf of a party fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that circumstances make an award of expenses unjust.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c). [(A), (B), and (C) of subdivision (b)(2), referred to above, are:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any part thereof, or rendering a judgment by default against the disobedient party;]

(c) *Demand for judgment.* A judgment by default shall not be different in kind from or exceed in amount that prayed for in the demand for judgment. Except as to a party against whom a judgment is entered by default, every final judgment shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in his pleadings.

Rule 55. *Default.*

(a) *Entry.* When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend as provided by these rules and that fact is made to appear by affidavit or otherwise, the clerk shall enter his default.

(b) *Judgment.* Judgment by default may be entered as follows:

(1) *By the Clerk.*

* * * * *

(2) *By the Court.* In all other cases the party entitled to a judgment by default shall apply to the court therefor; but no judgment by default shall be entered against an infant or incompetent person unless represented in the action by a general guardian, committee, conservator, or other such representative who has appeared therein. If the party against whom judgment by default is sought has appeared in the action, he (or, if appearing by representative, his representative) shall be served with written notice of the application for judgment at least 3 days prior to the hearing on such application. If, in order to enable the court to enter judgment or to carry it into effect, it is necessary to take an account or to determine the amount

of damages or to establish the truth of any averment by evidence or to make an investigation of any other matter, the court may conduct such hearings or order such references as it deems necessary and proper and shall accord a right of trial by jury to the parties when and as required by any statute of the United States.

* * * * *

(d) *Plaintiffs, Counterclaimants, Cross-Claimants.* The provisions of this rule apply whether the party entitled to the judgment by default is a plaintiff, a third-party plaintiff, or a party who has pleaded a cross-claim or counterclaim. In all cases a judgment by default is subject to the limitations of Rule 54(c).